Docket for 02-1593

No. 02-1593	Status: ARGUED
Title:	BedRoc Limited, LLC, and Western Elite, Inc., Petitioners v. United States, et al.
Docketed:	May 2, 2003
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(01-17080)
Decision Date:	December 30, 2002

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 19 2003	Application (02A794) to extend the time to file a petition for a writ of certiorari from March 30, 2003 to April 30, 2003, submitted to Justice O'Connor.
Mar 21 2003	Application (02A794) granted by Justice O'Connor extending the time to file until April 30, 2003.
Apr 30 2003	Petition for writ of certiorari filed. (Response due June 2, 2003)
May 29 2003	Order extending time to file response to petition to and including July 2, 2003.
Jun 27 2003	Order further extending time to file response to petition to and including August 1, 2003.
Jul 30 2003	Brief of respondents United States, et al. in opposition filed.
Aug 1 2003	Brief amici curiae of Associated General Contractors, et al. filed.
Aug 13 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 30 2003	Petition GRANTED.
Nov 3 2003	SET FOR ARGUMENT Tuesday, January 20, 2004.
Nov 6 2003	Record received from the U.S.C.A. for the 9th Circuit. (1 folder)
Nov 12 2003	Record received from the U.S.D.C. for the District of Nevada. (1 box)
Nov 14 2003	Joint appendix filed.
Nov 14 2003	Brief of petitioners BedRoc Limited, LLC, and Western Elite, Inc. filed.
Nov 14 2003	Brief amicus curiae of National Stone, Sand & Gravel Association filed.
Nov 14 2003	Brief amici curiae of Associated General Contractors of America, et al. filed.
Nov 26 2003	CIRCULATED.
Dec 19 2003	Brief of respondents United States, et al. filed. (Distributed)
Jan 9 2004	Reply of petitioners BedRoc Limited, LLC, and Western Elite, Inc. filed. (Distributed)
Jan 20 2004	Argued. For petitioners: R. Timothy McCrum, Washington, D.C. For respondents: Thomas L. Sansonetti, Assistant Attorney General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; UNITED STATES BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals." Citing *Watt v. Western Nuclear*, 462 U.S. 36 (1983), the Ninth Circuit ruled that the Pittman Act reserved *all* sand and gravel as "valuable minerals," regardless of whether the materials at any given property had economic value at the time the land was patented.

The questions presented are:

(1) Whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were "valuable minerals" at the time of the patent; and

(2) If *Watt v. Western Nuclear* calls for the application of a *per se* rule regarding the reservation (or non-reservation) of common materials, whether congressional intent would be better served by a rule that common materials are *not* reserved to the government as "valuable minerals."

RULE 29.6 STATEMENT

BedRoc Limited, LLC, is a Nevada limited liability company that has no parent corporation. No publicly held company owns a 10% or more equity interest in BedRoc Limited, LLC.

Western Elite, Inc. is a Nevada corporation. Western Elite has no parent corporation and no publicly held company holds 10% or more of Western Elite's stock.

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PETITION FOR A WRIT OF CERTIORIARI

BedRoc Limited, LLC, and Western Elite, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a–21a) is reported at 314 F.3d 1080. The opinion of the United States District Court for the District of Nevada (App. B, 22a–38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (App. C, 39a–63a) is reported at 140 IBLA 295 (1997).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor granted an extension of time to file this petition to April 30, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pittman Underground Water Act of 1919, 78 Stat. 293-95 (repealed 1964); Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 1976); and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611, are set forth at App. D, E, and F (64a-71a).

STATEMENT

Factual Background. Enacted in 1919, the Pittman Underground Water Act (the "Pittman Act") was part of Congress's decades-long effort to encourage settlement of the American West through land grants to those who would

lead the way. *See* 41 Stat. 293-95 (1919). Focusing on the State where the various Homestead Acts had been least successful due to inadequate surface water resources, the Pittman Act authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands ... in the State of Nevada." *Id.* Prospectors who discovered and successfully developed an underground water source could obtain patents for up to 640 acres of land. Such patents reserved to the United States "all the coal and other valuable minerals," which in turn would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." Pittman Act § 8, App. 67a.

Very few prospectors rose to the formidable challenge, and the Pittman Act was generally viewed as a failure when it was repealed in 1964. *See* 78 Stat. 389 (1964). Newton and Mabel Butler (the "Butlers"), however, had succeeded in developing underground water and, as a result, had secured a patent for 560 acres in Lincoln County, Nevada. *See* Ninth Circuit Excerpts of Record ("ER") at 33-36. The United States Department of the Interior ("DOI") certified the Butler property as non-mineral and available for disposition under the Pittman Act in 1938, and the Butler's patent issued on March 12, 1940. *See* ER 33-34, 36-41.

Common sand and gravel were abundant on the property and in the area generally when the Butler patent issued in 1940, but there was no market for such materials due to the remote location. *See* ER 34-35. Ultimately, expansion of the city of Las Vegas in the 1990s created a market for gravel in the area, and the lessee of a successor owner began a sand and gravel operation. *See* ER 34-35, 37. In February 1993, Earl Williams purchased the property and continued

the extraction of sand and gravel. Petitioner BedRoc Limited, LLC, ("BedRoc") acquired the property on July 27, 1995, and has continued the sand and gravel operation since that time.[1]

Procedural History. On March 26, 1993, the Bureau of Land Management ("BLM") issued a trespass notice to then-owner Earl Williams, claiming that sand and gravel on the property was reserved to the United States. *See* Ninth Circuit Supplemental Excerpts of Record ("SER") 96-97. BLM issued a decision in April 1993, citing this Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) and finding Williams in trespass. SER 98. The Interior Board of Land Appeals ("IBLA") affirmed the BLM decision in October 1997. *Earl Williams*, 140 IBLA 295 (1997).

Jurisdiction in the district court was based on 28 U.S.C. § 1331. BedRoc and Williams filed a combined action on July 2, 1998, seeking review of the IBLA decision and to quiet title to the sand and gravel. ER 1. Western Elite, Inc., which had acquired a portion of the property from BedRoc, also joined the suit to quiet title. On cross-motions for summary judgment, the district court ruled that sand and gravel are "other valuable minerals" reserved to the United States under the Pittman Act as a matter of law. App. 23a. The Ninth Circuit affirmed.

The Ninth Circuit's Opinion. The Ninth Circuit ruled that the phrase "valuable minerals" in the Pittman Act is

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[1] In order to continue operations pending final determination of ownership of the sand and gravel, BedRoc entered into an agreement pursuant to which it has paid BLM's claimed royalties into an escrow account. ER 48.

ambiguous as to whether it includes sand and gravel. App. 8a. Turning to the statutory purpose and legislative history, the court concluded that Congress intended the Pittman Act mineral reservation "to serve the same purposes and have the same scope as the [mineral] reservation under the [Stock-Raising Homestead Act of 1916 ("SRHA")]" addressed by this Court in *Western Nuclear*. App. 12a. The Ninth Circuit thus reasoned that "the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources . . . for separate disposition and development." App. 12a (quoting *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977) which also concerned an SRHA reservation).

The court rejected BedRoc's contention that ordinary sand and gravel could only be reserved as "valuable minerals" if it had economic value at the time of the patent. App. 18a. Instead, citing *Western Nuclear*, the Ninth Circuit ruled that *all* sand and gravel was reserved to the United States. App. 19a.

REASONS FOR GRANTING THE PETITION

This petition addresses the Ninth Circuit's over-broad construction of this Court's 1983 ruling in *Watt v. Western Nuclear* that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"). Although this case and *Western Nuclear* involve two different land grant statutes, both now defunct, the Ninth Circuit concluded that their mineral reservations are coextensive. The Ninth Circuit misconstrued *Western Nuclear*, however, to establish an expansive and improvident rule for construing the rights of Western property owners who hold title subject to statutory mineral reservations in

favor of the United States. As described below, even when the term is afforded its broadest potential interpretation consistent with basic mineral law, common materials such as sand and gravel are regarded as "minerals" only when they have economic value at the time of the patent.

The decision below holds that general statutory mineral reservations (*e.g.*, statutory reservations of "coal and all other minerals" or "coal and all other valuable minerals") encompass any common mineralogical materials that may have "utility." Moreover, according to the Ninth Circuit, *all* such materials are reserved, regardless of whether the particular substances at issue in any given land patent met the definition of "minerals" (let alone "valuable minerals") at the time of the conveyance. The proper rule, however, was acknowledged in *Western Nuclear*: Common materials can be identified as "minerals" only if they have economic value. Unless economic value exists at the time of the conveyance, common materials thus are not within the scope of "minerals" reserved.

The court's interpretation of *Western Nuclear* offends long-standing and fundamental principles of mining and property law. In addition, it renders the Butlers and each of their successors in title the functional equivalent of tenant farmers, granted little more than the privilege of tending lands actually owned by the government. Their land and the land of other similarly situated "surface owners" is not theirs to use as they see fit (except for ranching and farming) and is subject to entry in futuro by anyone the United States might authorize to dig up and remove the very materials that make up most of the land. Thus, the current "owners" of tens of millions of acres of Western lands will be something

considerably less than owners in any traditional sense unless the decision below is reversed.[2]

With respect to issues such as those presented in this case, involving the scope of federal land patents that affect millions of acres of Western lands, this Court is the primary source of governing law. The Court's role is as central on this matter of basic property rights as is that of the state courts dealing with basic state law property issues. This is not an area properly left to Congress, as the Acts in question have been repealed. Particularly where this Court's prior decision is the source of confusion, the Court should exercise its certiorari jurisdiction to ensure that the essential rights of so many land owners are not improperly narrowed.

I. The Ninth Circuit Has Misconstrued This Court's Decision in *Western Nuclear*.

In *Watt v. Western Nuclear*, this Court addressed the mineral reservation in Section 9 of the SRHA, which reserved "all the coal and other minerals" in SRHA-patented lands.[3] The land at issue was patented in 1926 and was

[2] Roughly 33 million acres of patented lands were directly affected by the *Western Nuclear* decision. *See* 462 U.S. at 42. The ruling below demonstrates that the Ninth Circuit's erroneous interpretation of *Western Nuclear* will govern property rights not just on those lands, but on all lands patented under similar general statutory mineral reservations. One leading treatise identifies *thirteen* such federal statutes requiring the reservation of all minerals in certain conveyances by the United States. *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002).

[3] SRHA Section 9, 39 Stat. 862 (repealed 1976), is produced at App. E, 69a-70a. The mineral reservation provisions of the SRHA and the Pittman Act are identical, except for the Pittman Act's use of the phrase "other valuable minerals" instead of "other minerals." *See* App. 67a.

acquired by Western Nuclear, Inc., in 1975 for the purpose of extracting gravel from an "old gravel pit." 475 F. Supp. 654, 655 (D. Wyo. 1979). BLM challenged the gravel extraction, and the IBLA ruled that "*gravel in a valuable deposit* is a mineral reserved to the United States in patents issued under the [SRHA]." 35 IBLA 146, 165 (1978) (emphasis added). The district court agreed, but the Tenth Circuit reversed.

The Tenth Circuit found that gravel was not a "mineral" under the SRHA largely because, at the time of enactment, DOI had ruled that such common substances were not "minerals" under the general mining laws. *See* 664 F.2d 234, 239-40 (10th Cir. 1981) (citing *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310 (1910)). Thus, the Tenth Circuit found that Congress in 1916 likely did not understand "minerals" to include common gravel. *Id.* at 240. In addition, the court reasoned that reserving common substances such as rocks, stones, and gravel to the government would make SRHA patentees the owners of "only the dirt, and little or nothing more," thus defeating the purpose of the grant. *Id.* at 242.

This Court granted the United States' petition for certiorari "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA." 462 U.S. at 42. In briefing, the United States argued that the SRHA mineral reservation was "coextensive with the class of minerals subject to location under the general mining law,[4] which restricts development

[4] The phrase "general mining laws" refers primarily to the Mining Act of 1872, as amended, currently codified at 30 U.S.C. § 22 *et seq.* These laws govern the disposal of "all valuable mineral deposits in lands belonging to the United States." 30 U.S.C. § 22.

to 'valuable mineral deposits.'"[5] The United States explained that "what this test means is that the *mineral reservation embraces only deposits of gravel and other mineral materials which are commercially exploitable and would justify a mineral entry*." Pet. Br. § II.A.2. (emphasis added). The government argued that DOI's *exclusion* of common materials from treatment as "minerals" from 1910 to 1929 was an aberration and that the customary "marketability" test instead should be the benchmark for identifying reserved gravel deposits. *Id.* § III.A.2. Western Nuclear, on the other hand, contended that the government had never argued or introduced evidence on marketability in the lower courts. Western Nuclear thus asked that the Court *not consider* the issue, but only affirm that gravel was not a "mineral" at all within the meaning of the SHRA. Res. Br. § I-II.

The Court reversed the Tenth Circuit in a 5 to 4 ruling, finding that Congress's intended meaning of "minerals" in 1916 was not clear. 462 U.S. at 46-47; *id.* at 65-66 (dissenting opinion by Justices Powell, Rehnquist, Stevens, and O'Connor).[6] Turning to the purpose of the SRHA, the Court found that "Congress' [sic] underlying purpose in severing the surface estate from the mineral estate was to facilitate the concurrent development of both surface and

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[5] *Western Nuclear*, Pet. Br., Summary § II.A.2. Thus, according to the government, "not every deposit of gravel will warrant interference with the homesteader's surface estate; only those which – in light of the abundance of the resource, the quality of the gravel, the condition of the market, and the distance from buyers – can be extracted at a profit will do so." *Id.*

[6] The dissenters found that the common and legal understanding of "minerals" at the time of enactment was clear and did *not* include gravel.

subsurface resources." *Id.* at 47. Thus, "[w]hile Congress expected that homesteaders would use the surface of SRHA lands for stock-raising and raising crops, it sought to ensure that *valuable subsurface resources* would remain subject to disposition by the United States. . . ." *Id.* (emphasis added).

Based on this statutory purpose, the Court ruled that "minerals" reserved under the SRHA should include:

> . . . substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate.

462 U.S. at 53. Applying this definition, the Court ruled that "gravel is a mineral reserved to the United States in lands patented under the SRHA." *Id.* at 60.

Substantial portions of the Court's decision analyze how the general mining laws bear on the identification of reserved gravel deposits. In particular, the Court devoted considerable attention to the treatment of gravel deposits as "valuable mineral deposits" under the mining laws. *See* 462 U.S. at 50-51, 55-59. The Court explained, for example, that economic value is a prerequisite to the treatment of gravel deposits as "minerals" subject to location under the mining laws. According to the Court:

> The treatment of *valuable deposits of gravel as mineral deposits locatable under the mining laws reflect [sic] an application of the "prudent-man test"* .... Under this test, which has been repeatedly approved by this Court, a deposit is locatable if it is "of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a

> reasonable prospect of success, in developing a valuable mine." . . . *In the case of nonmetalliferous substances such as gravel, the Secretary has required proof that "by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.*"

Id. at 58 n.18 (citations omitted) (emphasis added). The Court reasoned that "[t]he treatment of gravel as a mineral under the general mining laws suggests that gravel should be similarly treated under the SRHA, for *Congress clearly contemplated that mineral deposits in SRHA lands would be subject to location under the mining laws . . . .*" *Id.* at 59 (emphasis added).[7]

In the case presented here, BedRoc introduced undisputed evidence that the sand and gravel at the Butler property had *no economic value* until the 1990s and thus was *never* a "valuable mineral" subject to location under the mining laws. The Ninth Circuit, however, rejected the notion that the mineral reservation was coextensive with the mining laws. App. 19a. Moreover, the court interpreted *Western Nuclear* to call for the application of statutory mineral reservations (*i.e.*, reservations mandated by statute) as a "straightforward legal [question] regarding congressional intent." App. 20a. On this basis, the court deemed the value (or worthlessness) of the materials at any

[7] *See also* 462 U.S. at 62 n.4 (dissent agreeing that "mineral exploitation of SRHA lands was made subject to the same restrictions that characterize development of lands under the general mining laws, and thus the interpretation of those laws is directly pertinent to determining congressional intent in 1916").

given property irrelevant. Based on DOI statistical reports from the 1910s that included dollar values for gravel production nationwide, the court reasoned that sand and gravel *generally* were recognized as "valuable" and ruled as a matter of law that *all* sand and gravel was reserved under the Pittman Act.

The Ninth Circuit thus misapprehended the basis for, and the breadth of, the *Western Nuclear* decision. The Court in *Western Nuclear* found "no indication that Congress intended the mineral reservation in the SRHA to be *narrower in scope than the mining laws*." 462 U.S. at 59 (emphasis added). The Court did *not* rule, however, that Congress intended the reservation to be *broader in scope* than those laws. Instead, the Court's analysis makes plain that the scope of "minerals" subject to the mining laws *directly* corresponds to the scope of the mineral reservation.

Given the importance of "marketability" and the "prudent-man test" to identifying gravel deemed "mineral" under the mining laws, *Western Nuclear* cannot reasonably be construed to support the notion that those concepts are immaterial to determining whether gravel at any particular property was intended to be reserved. Indeed, the decision turned entirely on Congress's purpose of reserving "*valuable* subsurface resources," and the Court spoke repeatedly of "valuable gravel deposits," deposits "subject to location" under the mining laws, and the "prudent-man test." *See supra.* While some of the Court's statements were expressed in rather broad terms, the Court's reasoning in no way supports the arbitrary reservation of *all* gravel to the government – even gravel that was *not* subject to the mining

laws because it had *no market value* during any relevant time period.[8]

To the consternation of many lower courts and commentators, *see infra* III.A., the *Western Nuclear* decision opened the door to claims that common gravel was reserved to the United States as a "mineral." It did not, however, address the important question presented here: whether a statutory reservation of "minerals" encompasses *all* gravel, regardless of value at the time of the patent. The *Western Nuclear* case was presented on a limited factual record, and the surface owner itself never argued that the gravel's value post-dated the reservation (*i.e.*, the 1926 patent). Significantly, however, the Court quoted a BLM appraisal finding that gravel production was "the highest and best use of the property," in addition to the IBLA's ruling that "gravel *in a valuable deposit* is a mineral reserved to the United States . . . ." 462 U.S. at 40-41 (emphasis added). Read as a whole, the decision strongly suggests that the Court assumed the requisite commercial value had been established on the basis of these findings.

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[8] Because the sand and gravel at issue here had no market value until the 1990s, it could not have been identified as "mineral" under the mining laws when the statute was enacted, when the land was patented in 1940, or at any other time until decades after Congress removed common materials from the purview of the mining laws under Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611 (App. 71a).

II. Review Is Warranted to Clarify This Court's Ruling in *Western Nuclear*.

A. *Western Nuclear* Does Not Support the Ninth Circuit's Rule that All Gravel Is Reserved Under a Statutory Mineral Reservation, Irrespective of Its Lack of Economic Value at the Time of the Grant.

Given the Ninth Circuit's reliance on *Western Nuclear* with respect to an issue that was *not* addressed in that case, the Court's ruling should be clarified and limited. Aside from the importance of the issue to Pittman Act patentees and their successors, review is critical to clarify ownership of tens of millions of acres patented pursuant to the SRHA or any other federal statute mandating a general mineral reservation.

B. Only Materials Defined as "Minerals" at the Time of the Patent Were Reserved.

The Ninth Circuit ruled that sand and gravel need not be present in a "valuable mineral deposit" at the time of the patent in order to be reserved as "valuable minerals." App. 18a-19a. The court reasoned that the term "valuable minerals" (in the mineral reservation) is broader than "valuable mineral deposits" (locatable under the mining laws) because certain substances like gold are undeniably "valuable minerals" even if they are present in deposits too small or inaccessible to profitably extract. *Id.*

The court's rationale disregards the central role that "value" plays in identifying "minerals" under the mining laws. "Minerals" for purposes of mining law can be virtually any mineralogical substance that can be extracted from the earth and that has *independent value distinct from the surrounding earth*. As one early court explained:

> . . . having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, *having sufficient value, separated from its situs as part of the earth*, to be mined, quarried, or dug for its own sake or its own specific uses. That is the sense in which it is most commonly used in conveyances and leases of land . . . .

Hendler v. Lehigh Valley R. Co., 58 A. 486, 487 (Pa. 1904) (emphasis added) (finding common mixed sand that had utility but no commercial market value was not "mineral"). According to one leading authority: "The real test seems to be the character of the deposit as occurring *independently of the mere soil, valuable in itself* for commercial purposes . . . ." 1 Curtis H. Lindley, AMERICAN LAW RELATING TO MINES AND MINERAL LANDS, § 93, at 156 (3d ed. 1914) (emphasis added).

"Value" is integral to identifying "minerals" under the mining laws by design, as it allows the concept of what is "mineral" to evolve over time. As the DOI Solicitor explained in 1956:

> The reasons for the emphasis given in the mining laws to "value" rather than to defining the term "minerals" is apparent when consideration is given to the fact that *what is or what is not a "mineral" is not a static matter of scientific certainty, but is subject to change as new uses are discovered for the many varied mineralized substances found in the earth.*

United States Department of the Interior, Solicitor Op. M-36379, at 2 (Oct. 3, 1956) (emphasis added). Explaining how the concept applies to the common, non-metallic

substances that make up much of the land itself, "value" would be found – and the substances would be recognized as "mineral" – "*only if they were valuable for commercial purposes and located near enough to a market to provide an economic return.*" *Id.* (emphasis added).

Thus, common non-metallic substances are different from intrinsically valuable minerals (such as gold) under the mining laws in that *site-specific circumstances* (*e.g.*, accessibility, quantity, proximity to market, etc.) alone account for their value. Because of their relative abundance in the earth, such substances have no recognized intrinsic value and therefore attain "mineral" status only by virtue of special features or circumstances that give them value. Common materials have *always* been fundamentally different from intrinsically valuable minerals in this respect, even though their treatment under the mining laws has otherwise varied over the years.

Prior to 1929, for example, common materials like gravel were deemed not "mineral" unless they possessed some "peculiar" characteristic establishing "distinct and special value." *See infra* III.B.[9] Even after DOI reversed that general rule in 1929, however, such common materials were deemed mineral only "if they were *valuable for commercial purposes and located near enough to a market* to provide an economic return." Solicitor Op. M-36379, at 3 (emphasis added). Finally, under the Surface Resources Act of 1955, 30 U.S.C. § 611, Congress again removed common

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[9] The "peculiar" characteristic might be, for example, the presence of small quantities of an intrinsically valuable mineral like gold appearing within a deposit of a more common deposit like gravel. *See Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 313 (1910).

materials from the purview of the mining laws unless they met the "distinct and special value" test that was in place prior to 1929.

Even applying the most expansive view that was in vogue from 1929 to 1955, only common materials of *economic value* could be deemed "minerals" subject to reservation. The 1956 Solicitor's Opinion mentioned above applied precisely this test in the interpretation of a 1926 *statutory mineral reservation*,[10] concluding that:

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), *which can be shown as of the date of the allotment or patent to have a definite economic value* by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

Id. (cover summary).[11] The Solicitor was careful to point out that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* at 4 (emphasis added).

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[10] The statutory reservation at issue was more broadly worded than the Pittman Act, calling for the reservation of "timber, coal or *other minerals* including oil and gas *or other natural deposits*."

[11] *See also id.* at 3 ("These concepts of 'value' and 'existence of a market' have also been long applied by the authorities in construing mineral reservations in grants of private lands.") (citing *Lindley, supra,* § 93, and *Hendler v. Lehigh Valley R. Co.*, 209 Pa. 256, 58 A. 486 (Pa. 1904).

It is thus entirely consistent with long-standing DOI policy – as well as fundamental principles of mining and property law – to apply statutory mineral reservations in light of *economic value at the time of the reservation* where common substances are at issue. For common materials, site-specific economic value literally dictates whether the materials are "mineral." If patentees are entitled, in theory, to know what has been granted at the time of the conveyance, then only common materials of the requisite value *at the time of the conveyance* can be reserved.

This is in accord with the interpretation of reservations in other contexts as well, where the courts seek to discern and enforce the intent of the parties at the time of the transaction. *See, e.g., Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] *if it has the requisite value*. And there may be instances wherein a reservation of minerals has been made in past years and wherein the requisite *value was present and recognized to be so* in the minds of the parties.") (concurring opinion). The substances to be reserved must be determinable (at least in theory) as of the date of the patent, or else the grant is meaningless and the patentee's title is constantly shifting in response to changing economic conditions.

III. Review Is Warranted to Consider Whether "Valuable Minerals" Includes Common Materials Like Sand and Gravel.

A. *Western Nuclear* Was Itself Out of Step with Long-Standing and Still Prevailing Views on the Treatment of Common Materials.

The Ninth Circuit's expansion of *Western Nuclear* is erroneous and distressing. Yet it merely compounds the confusion and inequity that has already arisen in the wake of that decision. This Court's interpretation of the SRHA mineral reservation to encompass common substances such as gravel was itself a sharp departure from traditional understandings. *Western Nuclear* stands in stark contradiction to long-standing view of the overwhelming majority of courts addressing mineral reservations in other contexts. Indeed, "the *vast majority of courts* have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals." *Miller Land & Mineral*, 757 P.2d at 1003. *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954).[12]

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[12] *See also Bambauer v. Menjoulet*, 214 Cal. App. 2d 871 (1963); *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *Fisher v. Kewenaw Land Ass'n*, 124 N.W.2d 784 (Mich. 1963); *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975). *See generally* 54 Am. Jur. 2d Mines & Minerals, § 8 (1971).

Western Nuclear's determination that a valuable gravel deposit was reserved under the SRHA mineral reservation typically has been distinguished by lower federal courts and state courts, which decline to construe general reservations to include such materials in other contexts. *E.g.*, *Miller Land & Mineral*, 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (limestone not reserved where government acquired surface estate from private party). Thus, courts since *Western Nuclear* have been in general agreement that its reasoning is inapplicable in the context of private conveyances, where the courts look (as they traditionally have) to the intent of the parties at the time of the conveyance. Because the overwhelming understanding of the term "minerals" has traditionally *excluded* common materials such as gravel, these courts have generally concluded that such substances were not reserved.

Significantly, *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not mandated in the statute itself. *See United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands"); *Poverty Flats Land & Cattle*, 788 F.2d at 681 (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"). In these cases, because

Congress's intent is not controlling as to the scope of the reservation, the intent of the parties at the time of the conveyance controls, consistent with the approach to private conveyances. *See Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties … as used in the exchange patent at issue").

The reservation of common materials to the government under *Western Nuclear* thus has created a distinct, and more limited, surface estate where the land at issue can be traced back to a patent under the SRHA, the Pittman Act, or presumably any other statute with a mandatory mineral reservation. The distinction creates uncertainty and inequity in an area already dubbed the "tar baby" of natural resource law. *See* John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984). *See also Miller Land & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is an confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . ."). Even courts that have followed *Western Nuclear* (because, for example, SRHA lands were at issue) have expressed reluctance to impose such second-class status on the surface owners of these lands. *See Champlin Petroleum Co. v. Allstate Construction, Inc.*, 708 P.2d 319, 321 (N.M. 1985) ("We, of course, must adopt the classification that the majority of the Supreme Court has accorded to the meaning of a federal act, even though we may share the reservations of the dissenters that the majority's definition of a reserved mineral may be overly broad.").

The Ninth Circuit's approach represents a significant expansion of *Western Nuclear* based on the court's apparent desire to adopt a uniform, simplified rule that would not turn on proof of "economic value" at the time of the patent.

Petitioners respectfully submit, however, that if a uniform rule is to be followed – that all sand and gravel is reserved, or all sand and gravel is not reserved – then the latter is the better rule and *Western Nuclear* should be reconsidered.

B. The Ordinary Meaning of "Minerals" Did Not Include Common Materials Such as Sand and Gravel at the Time of Enactment.

The Ninth Circuit acknowledged that "the *ordinary meaning of the phrase 'valuable minerals' does not evoke images of sand and gravel.*" The court nevertheless deemed the statutory text ambiguous because the reservation of "valuable minerals" did not "*conclusively convey* Congress' [sic] intent as to whether sand and gravel are included." App. 8a (emphasis added).

The Ninth Circuit's standards for textual specificity contradict this Court's recent admonition that statutory mineral reservations should be construed according to their *ordinary meaning* at the time of enactment. *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), provides that statutory mineral reservations are not ambiguous merely because they fail to *conclusively* include or exclude particular substances. There, the Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. The Tenth Circuit found the term "coal" ambiguous as to the inclusion of CBM gas and invoked the canon of construction of ambiguities in favor of the sovereign. *See* 526 U.S. at 871-72.

This Court reversed based on its finding that "the *common conception* of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was

the country's primary energy resource." *Id.* at 874 (emphasis added). According to the Court:

> The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was *dealing with a practical subject in a practical way*" and that it intended the terms of the reservation to be understood in "their *ordinary and popular sense*."

Id. at 873 (emphasis added) (citing *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914), and *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Because the "most natural interpretation" of "coal" in the relevant statutes did not encompass CBM gas, the Court found no ambiguity and no need for resort to canons of construction. *Id.* at 880.

The Ninth Circuit's decision that "valuable minerals" is ambiguous as to sand and gravel disregards the "*general understanding*" explained by DOI in 1910. According to DOI then, "unless they possess a *peculiar property* or characteristic giving them a special value," common materials such as gravel "*were not to be regarded as mineral*." *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 312 (1910) (emphasis added). The *Zimmerman* decision addressed whether a commercially valuable deposit of common gravel, marketable because of its proximity to a town, could constitute a "mineral" under the general mining

laws. *Id.*[13] Citing prior decisions involving common substances that were "valuable only for general building purposes," DOI concluded that:

> . . . the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material *not recognized by standard authorities as such*, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

Id. (emphasis added). DOI's decision concerning gravel in *Zimmerman* was based on a "search of the standard American authorities" that "failed to disclose a single one which classifies a deposit such as claimed in this case as mineral." *Id.* Moreover, DOI was not "aware of any application to purchase such a deposit under the mining laws." *Id.*

The *Zimmerman* decision was thereafter followed as *conclusive* that ordinary gravel was not "mineral" under the mining laws, regardless of its commercial value. *See Litch v. Scott*, 40 Pub. Lands Dec. 467, 469 (1912). Its reasoning also was applied in determinations concerning other common materials, such as commercially valuable shell rock. *See Hughes v. State of Florida*, 42 Pub. Lands Dec. 401, 403-04 (1913) ("In harmony with [the *Zimmerman* decision], the deposit of shell rock here involved cannot be held a mineral under the general mining laws.").

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[13] DOI noted that "[t]he question of what constitutes a 'mineral' within the meaning of the above statutes is not free from doubt, and has frequently been before the Department for adjudication." *Id.*

This common understanding of "mineral" was also identified in *United States v. Aitken*, in which the court found that commercial gravel had "never been considered as a mineral." 25 Philippine Rep. 7, 16 (1913). According to the court:

> [If] an examination be made of the individual adjudicated cases and the decisions of the United States Land Department, upon which these general definitions of the term "mineral" are based, it will be found that *commercial gravel* was not a factor in forming them, and that it has *never been considered as a mineral*.

Id. (emphasis added).

In 1929 and for the next 25 years, DOI abandoned the *Zimmerman* rule in favor of a case-by-case approach recognizing particular deposits as "mineral" *if* they possessed value sufficient to justify mineral status under the traditional "prudent-man" test. *See Layman v. Ellis*, 52 Pub. Lands Dec. 714 (1929); Solicitor Op. M-36379. Nevertheless, in terms of the common meaning *prior to* 1929, the decisions discussed above leave little room for doubt that "minerals" did not include materials such as ordinary sand and gravel, even if they *were* commercially valuable.[14] The potential "mineral" status of those materials was established only after

[14] After reviewing the body of law discussed above, the dissent in *Western Nuclear* concluded that "it was beyond question, when SHRA was adopted in 1916 [and until 1929] that the Department had ruled consistently that gravel was not a mineral under the general mining laws." 462 U.S. at 65. Accordingly, "one must conclude that Congress intended the term 'minerals' in the new statute to have the meaning so recently and consistently given it by the Department in construing and applying the general mining laws." *Id.*

the *Layman* decision in 1929 – and even then only for particular deposits with characteristics (quantity, accessibility, proximity to market, etc.) sufficient to give them marketability and *economic value*.

C. Congress's Purpose of Encouraging the Settlement of the Arid West Does Not Support a Rule that Sand and Gravel Were Reserved to the Government.

Congress's intent to reserve only "valuable minerals" – and to convey *something* of value to patentees – would be thwarted by a rule reserving to the government the ubiquitous substances that comprise the patented lands themselves. If statutory mineral reservations are to be construed through a pure legal analysis of congressional intent at the time of enactment, that intent will surely be better fulfilled by a rule that such common substances were not reserved. Although the nation has presumably obtained the benefit of *its* bargain under the SRHA and the Pittman Act, review is necessary to ensure that patentees retain what was promised to them.

The Ninth Circuit recognized that the explicit purpose of the Pittman Act was "to encourage the exploration for and development of artesian and subsurface waters in the State of Nevada" by "creat[ing] an incentive for private individuals to risk time, labor, and money in prospecting for water." App. 9a. Because Congress hoped that the discovery of water would spur agricultural development, however, the court reasoned that the land grants to prospectors "furthered the larger goal of irrigating arid lands for farming." App. 9a. The court thus found persuasive its own prior decision in *Union Oil* and this Court's decision in *Western Nuclear* concerning the SRHA, which served the same "larger goal." Finding that this Court had "agreed with our sentiment in

Union Oil," the Ninth Circuit invoked its prior rule that "the mineral reservation is to be read broadly in light of the *agricultural purpose* of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources . . . for separate disposition and development." App. 12a (emphasis added).

Reserving to the government the very substances that comprise the land, however, has no rational relationship to Congress's ultimate objective in the Western land grant statutes. While Congress undeniably identified farming and ranching as the most promising occupations with which to attract settlers, the *goal* was the long-term settlement and economic development of the West, not a system of sharecropping. As the House Public Lands Committee reported on one of the predecessor bills to the SRHA:

> Of course, the homestead plan is best for the individual States of the semiarid West. It takes homes to insure permanent settlers and taxpayers; it takes homes to bring schools and churches; it takes homes to *build cities and towns that attract and support laborers and mechanics; population invites railroads, which in turn bring more immigration and capital to develop the barely touched resources of this great semiarid West.*

H.R. Rep. No. 63-626, at 10-11 (1914) (emphasis added).

Agriculture thus was a means to an end – not an end in itself – with the true aim being a citizenry invested in and responsible for the land and the community. The *purpose* of granting lands to people willing in good faith to make a home there was the promotion of:

> . . . more States like, for instance, Kansas and Iowa, *where each citizen is the sovereign of a portion of the soil*, the owner of his home and not a tenant of some (perhaps) distant landlord, a builder of schools and churches, a voluntary payer of taxes for the support of his local government.

Id. at 11 (emphasis added).

The *Western Nuclear* dissenters reasoned that "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of that soil." 462 U.S. at 71-72. That intent is even more improbable here, where Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1 (1919). As this Court has held, where Congress:

> . . . offers to individuals or to corporations as an inducement to undertake and accomplish . . . works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and *should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.*

Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (emphasis added). The decision below does violence to this principle and effectively retracts ownership of the land from those who earned it and their lawful successors. The decision should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 01-17080

BEDROC LIMITED, LLC, a Nevada Limited Liability Company, *Plaintiff-Counter-Defendant-Appellant*, WESTERN ELITE, INC., a Nevada corporation, *Plaintiff-Appellant*, and EARL WILLIAMS, an individual, *Plaintiff-Counter-Defendant*,

v.

THE UNITED STATES OF AMERICA, Gale A. Norton, Secretary of the Interior; United States Department of the Interior, Bureau of Land Management, and Curtis L. Tucker, Area Manager, Caliente Resource Area Bureau of Land Management,

Defendants-Counterclaimants-Appellees.

Argued and Submitted Nov. 7, 2002.

Filed Dec. 30, 2002.

Before HAWKINS, GRABER, and TALLMAN, *Circuit Judges*.

OPINION

GRABER, *Circuit Judge:*

In this appeal, we must decide whether sand and gravel are "valuable minerals" within the meaning of the Pittman Underground Water Act (the Act or the Pittman Act), 43 U.S.C. §§ 351-359 (1935).[1] The now-repealed Act provided grants, or "patents," of federal public lands to people who found underground sources of water in the deserts of Nevada. Under the terms of the Act, these patents reserved "all the coal and other valuable minerals" to the United States. Pittman Act § 8.

Plaintiff BedRoc Limited[2] brought this action to quiet title in a parcel of land granted under the Act in 1940 to BedRoc's predecessor in interest. Citing the mineral reservation, the United States has claimed title to the sand and gravel on the parcel; BedRoc contends that sand and gravel are not "valuable minerals" within the meaning of the Act and thus were not reserved to the government. The

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[1] The closest codification to the time of the grant in this case is in the United States Code of Laws, January 3, 1935. 43 U.S.C. §§ 351-359 (repealed Aug. 11, 1964, Pub. L. No. 88-417, 78 Stat. 389 (subject to valid existing rights and obligations and without prejudice to pending claims)). We refer throughout this opinion to the sections of the Pittman Act as enacted.

[2] In 1996, BedRoc transferred 40 acres of the land to Western Elite, Inc. The parties agreed to amend the complaint to add Western Elite as a plaintiff in this action. Although Western Elite remains a plaintiff, for the sake of simplicity we refer to the plaintiffs collectively as BedRoc.

district court granted summary judgment in favor of the United States. We affirm.

We hold that sand and gravel are encompassed by the reservation of "valuable minerals" to the United States. The purpose of the Act and its legislative history instruct us to construe the reservation broadly. Moreover, government documents concerning minerals, published contemporaneously with the statute's enactment, describe the then-lucrative market for sand and gravel.

FACTS AND PROCEDURAL HISTORY

A. Historical Background

In 1910, only 81,875 people lived in Nevada. The federal government owned most of the land in Nevada. The lack of a tax base held back development of the state's infrastructure. The Homestead Acts, a successful tool for development in other western states, had failed to populate Nevada because of the lack of water available for agricultural cultivation. 54 Cong. Rec. S706 (1916).

At the time, it was thought that the future development of the state depended largely on the discovery of underground water, which could be used to irrigate land for agricultural purposes. Nevada's congressional representatives, however, failed to gain the necessary support to fund projects to explore for underground water. *Id.* As an alternative, Nevada Senator Key Pittman proposed the Pittman Underground Water Act as a means of encouraging private citizens to search for underground water in order to cultivate Nevada's arid lands.

Passed in 1919, the Act provided that the Department of the Interior would certify certain "nonmineral" public lands to parcel out to prospective settlers. Pittman Act § 1. Initially, the government issued two-year permits, giving

settlers the exclusive right to drill wells in a parcel of up to 2,560 acres. *Id.* If a settler could demonstrate successful irrigation of at least 20 acres, the United States would grant the settler a patent of up to 640 acres. Pittman Act § 5. The remaining acres would be divided into homesteads and distributed under the 160-acre Homestead Act. Pittman Act § 6.

The Act and the patents issued pursuant to the Act contain the following mineral reservation:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Pittman Act § 8 (emphasis added).

B. BedRoc's Patent

On March 12, 1940, Newton and Mabel Butler received a patent under the Act for 560 acres of land in Lincoln County, Nevada. "[I]n conformity with the . . . Act," the patent reserved to the United States "all the coal and other valuable minerals in the lands so granted, together with the right to prospect for, mine, and remove the same upon compliance with the conditions of and subject to the limitations of Section eight of said Act."

In the early 1990s, a lessee began taking sand and gravel from the property. Earl Williams purchased the property in

1993 and continued to extract sand and gravel. The Bureau of Land Management (BLM) issued trespass notices to Williams on March 26 and April 1, 1993. Williams challenged the notices. In response, the BLM issued a decision stating that Williams' removal of the sand and gravel trespassed against the government's reserved interest in the "valuable minerals" on the property. The Interior Board of Land Appeals upheld that decision on appeal, relying on the legislative history of the Act and on the intent of Congress in enacting it. *Earl Williams,* 140 I.B.L.A. 295, 304-13 (1997).

BedRoc acquired the property from Williams in 1995 and continued to remove sand and gravel. Pursuant to an agreement with the Department of the Interior, BedRoc placed money in escrow from the sale of each cubic yard of sand and gravel removed, pending final resolution of the ownership dispute.

C. District Court Proceedings

In the district court, BedRoc sought to quiet title in the sand and gravel and to determine how much of the funds in escrow should be paid to the government if the district court concluded that the mineral reservation included sand and gravel. BedRoc and the government filed cross-motions for summary judgment on the issue of ownership. The district court granted summary judgment in favor of the United States.

Before the district court resolved the remaining issues, the parties reached a settlement regarding the funds in escrow. The settlement provided that BedRoc could appeal only the ownership issues to this court. The district court entered a final judgment pursuant to the parties' stipulation, and this timely appeal followed.

STANDARD OF REVIEW

We review *de novo* a grant of summary judgment. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999). We also review *de novo* questions of statutory interpretation. *Lopez v. Wash. Mut. Bank*, 302 F.3d 900, 903 (9th Cir. 2002).

"We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." *Ariz. Appetito's Stores, Inc. v. Paradise Village Inv. Co. (In re Ariz. Appetito's Stores, Inc.)*, 893 F.2d 216, 219 (9th Cir. 1990). First, we examine the statute's text. *Siripongs v. Davis*, 282 F.3d 755, 758 (9th Cir. 2002). If the text of the statute makes Congress' intent clear, we need look no further. *United States v. Romo-Romo*, 246 F.3d 1272, 1275 (9th Cir. 2001). "Where the language is not dispositive, we look to the congressional intent revealed in the history and purposes of the statutory scheme." *United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002) (en banc) (citation and internal quotation marks omitted).

DISCUSSION

D. The Statutory Text

"The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530, 23 S. Ct. 365, 47 L. Ed. 575 (1903). A review of the dictionary definitions of "mineral" bears out that principle. Broadly, a "mineral" includes anything that is neither animal nor vegetable. Webster's Third New Int'l Dictionary 1437 (unabridged ed. 1993). Some definitions name "sand" specifically as an example of a "mineral." *See, e.g.*, Merriam-Webster Dictionary, *available at* http://www.m-w.com/. But, neither the text of the statute nor dictionary definitions answer the precise question here: Did Congress

intend sand and gravel to be included in the reservation of "*valuable* minerals" under the Pittman Act? Pittman Act § 8 (emphasis added).

The word "valuable" does not clarify the ambiguity. For purposes of statutory construction, we must determine "whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (emphasis added). Although the ordinary meaning of the phrase "valuable minerals" does not evoke images of sand and gravel, neither does the phrase obviously exclude those substances. Sand and gravel are not "valuable" in the way that diamonds or gold might be. However, late-nineteenth century dictionaries confirm that "valuable" did not simply mean "precious"; as it does today, "valuable" also described an object's utility. *See* Joseph E. Worcester, A Dictionary of the English Language 1614 (1897) (defining "valuable" as "having value or worth; being possessed of worth or useful properties; . . . useful"). In that sense, sand and gravel have value, both for their usefulness and for their commercial worth.

When the mineral reservation is read in context, the significance of the modifier "valuable" diminishes. The mineral reservation provision, section 8 of the Act, refers to minerals several times. Sometimes the modifier "valuable" is used, but at other times variants of the word "minerals" appear without qualification. For example, the statute provides that all "[t]he coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States." Pittman Act § 8. However, section 8 also provides that "[a]ny person who has acquired from the United States the coal or other mineral deposits" may enter the property with the consent of the patent holder. For that phrase to make sense, the United States must already have

owned "the coal or other mineral deposits." When considered in context, the modifier "valuable" does not, by itself, clearly limit the scope of minerals reserved to the United States.

In addition to containing the qualifier "valuable," the statute requires that land granted under the Act must first be certified as "nonmineral." Pittman Act § 1. BedRoc argues that this certification means that the government thought that the land contained no minerals at all and thus disclaimed any mineral deposits of which it was unaware at the time of grant. By contrast, the government asserts that, by granting patents only of lands that were "nonmineral," Congress expressed its intent to part only with the surface estate and to reserve *all* mineral deposits in the lands to the United States. Both interpretations are plausible; the requirement that the patented lands be designated "nonmineral" does not resolve the ambiguity.[3]

We conclude that the phrase "valuable minerals" in the Pittman Act's reservation is ambiguous. The text of the statute does not conclusively convey Congress' intent as to whether sand and gravel are included within the scope of the reservation. Because the text is unclear, we turn to a discussion of the statutory purpose, the legislative history, and other sources outside the statute to determine congressional intent.

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[3] There is a third plausible meaning of the "nonmineral" certification as well. The certification may have been intended to separate land expected to be used *primarily* for agriculture from land expected to be used *primarily* for extraction of minerals. See the discussion in the text below at pp. 1085-87 and 1088-89.

E. The Purpose of the Act

As stated in committee reports, the purpose of the Act was "to encourage the exploration for and development of artesian and subsurface waters in the State of Nevada." H.R. Rep. No. 66-286, at 1 (1919). The legislative purpose did not stop there, however. If water was discovered, it was meant to be put to use irrigating lands for agricultural development. Of course, part of the Act's purpose was to create an incentive for private individuals to risk time, labor, and money in prospecting for water. But this "reward" was not an end in itself. Rather, the Act granted land to water prospectors because their labor furthered the larger goal of irrigating arid lands for farming.

The threshold showing required to obtain a patent proves this point: The permit holder had to demonstrate that there were "underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres." Pittman Act § 5. Once that prerequisite was met, the remaining area under the permit was open to entry only under the 160-acre Homestead Act. Pittman Act § 6.

In the legislative history, numerous references to Nevada's agricultural future confirm that the larger goal of the Act was to encourage the cultivation of land for agricultural purposes: "The primary object of the bill is to encourage the development of the agricultural portions of the public domain in the State of Nevada, not susceptible of irrigation from any known source of surface water supply . . . ." H.R. Rep. No. 64-731, at 1 (1916); "The future development of the agricultural land of the State seems to depend largely upon the development of artesian water." H.R. Rep. No. 63-1418, at 2 (1915); *see also* S. Rep. No. 64-4, at 2 (1915) (stating same); "It is evident that the retarding of agricultural development in Nevada is due entirely to the

failure of the Government to provide laws under which the land could be acquired and the waters of the State developed and conserved." H.R. Rep. No. 66-286, at 2 (1919); "The geo-graphical situation of the State of Nevada, the absence of large streams or other large bodies of surface waters, the aridity or semiaridity of the soil, the other conditions peculiar to the State, fully warrant a special law designed to meet the situation and promote agricultural development." 54 Cong. Rec. S706 (statement of Sen. Pittman, reading a letter from the Secretary of the Interior).

If the aim of the land grants was to promote agriculture, it follows that the government meant to reserve minerals for other uses. In fact, full reservation of mineral rights was the policy in place at the time of the Act's passage.

In *United States v. Union Oil Co. of California,* 549 F.2d 1271, 1272 (9th Cir. 1977), we held that geothermal steam was reserved to the United States in grants made under the Stock-Raising Homestead Act (SRHA),[4] which was enacted only three years before the Pittman Act. We summarized the treatment of agricultural and mineral entries onto public land at the turn of the last century:

> Prior to 1909, public lands were disposed of as either wholly mineral or wholly nonmineral in character. This practice led to inefficiencies and abuses. In 1906 and again in 1907, President Theodore Roosevelt pointed out that some public lands were useful for both agriculture and

[4] The mineral reservation in the SRHA states that patents under the Act "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented." 43 U.S.C. § 299(a).

> production of subsurface fuels, and that these two uses could best be served by separate disposition of the right to utilize the same land for each purpose . . . . To that end, the President recommended "enactment of such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur . . . ."

Id. at 1274-75 (citation omitted) (quoting 41 Cong. Rec. 2806 (1907)). The President said that this "'system . . . will encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels in such manner as will best meet the needs of the people.'" *Id.* at 1275 n. 8 (quoting 41 Cong. Rec. 2806).

In *Watt v. Western Nuclear, Inc.,* 462 U.S. 36, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983), the Supreme Court considered the same legislative history when it decided that gravel was reserved to the United States in grants made under the SRHA. The Court relied heavily on the agricultural purpose of the SRHA and on the policy in place at the time of its enactment to sever the mineral estate from agricultural grants. The Court noted that, "[s]ince Congress intended to facilitate development of both surface and subsurface resources, the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.* at 52, 103 S. Ct. 2218. The Court reasoned that,

> [i]f we were to interpret the SRHA to convey gravel deposits to the farmers and stockmen who made entries under the Act, we would in effect be saying that Congress intended to make the exploitation of

> such deposits dependent solely upon the initiative of per-sons whose interests were known to lie elsewhere.

Id. at 56, 103 S. Ct. 2218. Thus, the Court agreed with our sentiment in *Union Oil* that "the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources . . . for separate disposition and development." *Union Oil,* 549 F.2d at 1279.

As we have said, Congress passed the SRHA in 1916, just three years before the Pittman Act. The floor debates surrounding the Pittman Act reveal that Congress intended the mineral reservation to serve the same purposes and have the same scope as the reservation under the SRHA. *See* H.R. Rep. No. 66-286, at 1 (1919) ("Section 8 of the bill contains the same reservations of minerals, with the facility for prospecting for and developing and mining such minerals as was provided in the [SRHA]."). Thus, congressional debates support the government's position, consistent with both *Western Nuclear* and *Union Oil,* that the mineral reservation in the Pittman Act is to be construed broadly.

F. Congressional Debate Concerning the Mineral Reservation

Congress – including Senator Pittman, the sponsor of the Act that bears his name – discussed at length the scope of the mineral reservation in the Pittman Act. *See Williams,* 140 I.B.L.A. at 304-13 (discussing the voluminous history of the Pittman Act); *see also Kalvinskas v. Cal. Inst. of Tech.,* 96 F.3d 1305, 1309 (9th Cir. 1996) (giving substantial weight to statements made by a bill's sponsor). Excerpts of the debates on this issue reveal that the mineral reservation was the product of a legislative compromise, without which the bill likely would not have passed.

During debates on the bill, Senator Thomas from Colorado moved for an amendment to remove the mineral reservation. 54 Cong. Rec. S707. Senator Pittman responded:

> [B]efore the Senator does that, I trust that he will consider the matter for a minute. This bill, as it was originally prepared by me, did not contain that reservation. When a similar bill was introduced in the House of Representatives, at my request, it met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands.
>
> There was not the slightest chance on earth of passing such a bill through the House of Representatives if there was the slightest suspicion that the bill could be used for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands. This reservation from all characters of agricultural entries is usual; and, without discussing the question of whether or not it is a good provision, I must say that *it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry.*

Id. (emphasis added).

Senator Pittman urged Senator Thomas to withdraw his amendment, for fear that its inclusion would "destroy the bill." *Id.* Senator Thomas continued to insist that patentees who prospect for water should be allowed to retain any minerals that they find. *Id.* Senator Pittman explained that "the Government by this bill reserves those minerals. It segregates them from the lands primarily granted for agricultural purposes." *Id.* Senator Thomas countered with

the suggestion that the bill "should provide for the acquisition of complete-title to 640 acres as a reward for developing its subterranean water courses." *Id.* Senator Pittman replied:

> I would favor that if I thought it would pass the bill; but I am confident that the inclusion of any such right in this grant would mean the destruction of the bill. . . .
>
> [I]f the Senator's amendment carries[,] the bill will die; and I certainly would rather have what I can get for the people of our State than to stand here on a technical question trying to get more, with the probability of losing all.

Id.

The amendment was rejected, and the mineral reservation to the United States remained. This portion of the debate suggests that, without the reservation, the House would not have passed the bill. Senator Pittman did not limit the reservation. Rather, he spoke about it quite broadly. Emphasizing the agricultural nature of grants under the Act, Senator Pittman understood the bill to separate the mineral estate entirely – "any character of minerals" – and reserve it to the government. Finally, this piece of history is instructive because it appears that Senator Thomas' view of the mineral rights as a "reward" for water prospectors was not shared by a majority of the Congress.

Later, the issue of the mineral reservation resurfaced in the House. 58 Cong. Rec. H6469 (1919). Representative Blanton moved to "reserve the mineral rights of the Government." *Id.* This colloquy ensued:

> Mr. KINKAID: They are reserved.

> Mr. EVANS: They are already re-served.
>
> Mr. BLANTON: The way I caught the bill it just spoke of the lands as nonmineral lands. Many lands classified as nonmineral and nonagricultural lands are, as a matter of fact, mineral and agricultural in some instances.
>
> MR. TAYLOR: Those reservations are made now by general law. It is not necessary to put that in. You can not get oil land by homesteading nowadays.
>
> Mr. BLANTON: It is *all* reserved?
>
> Mr. TAYLOR: Yes.
>
> Mr. BLANTON: These lands come under the general reservation?
>
> Mr. TAYLOR: Yes.
>
> Mr. BLANTON: These homesteads to-day do not contain any oil?
>
> Mr. TAYLOR: When you get a homestead, you do not get any oil under it. The oil that may be underneath it is reserved. . . .
>
> Mr. BLANTON: If the mineral rights are properly reserved, I have no objection.
>
> Mr. EVANS: They are properly reserved.

Id. (emphasis added).

Again, the reservation was discussed without reference to any limitation. More importantly, this portion of the debate demonstrates that Congress was doubtless aware that the characterization of lands as "nonmineral" did not mean that those lands contained no minerals. Rather, it meant that the land was "chiefly valuable" for resources other than

minerals. *N. Pac. Ry. Co.,* 188 U.S. at 534, 23 S. Ct. 365; *see also Union Oil,* 549 F.2d at 1274-76 (discus-sing the history of characterizing public lands as "mineral" or "nonmineral").

The breadth of the reservation of mineral rights discussed in the legislative history supports the government's position: Congress did not intend to convey any mineral rights to patentees under the Act. However, neither the cases construing the SRHA, nor the floor debates on the Pittman Act, shed any light on whether the term "valuable" significantly limits the reservation. We move next to a discussion of the meaning of the term "valuable" in this context.

G. "Valuable minerals"

The SRHA's reservation does not contain the adjective "valuable." Instead, the SRHA simply reserves "all the coal and other minerals" to the United States. 43 U.S.C. § 299(a). As discussed, the SRHA's contemporaneous enactment and analogous purpose are instructive to a degree. But, because the SRHA does not use the modifier "valuable," we cannot conclude simply that the two reservations are coextensive. "[I]t is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *City of Los Angeles v. United States Dep't of Commerce,* 307 F.3d 859, 870 (9th Cir. 2002) (quoting *TRW Inc. v. Andrews,* 534 U.S. 19, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001)).

Contemporaneous government publications persuade us that, even if Congress intended the word "valuable" to limit the kinds of minerals reserved to the United States, sand and gravel were reserved. As early as 1914, five years before the Pittman Act was passed, the Department of the Interior

devoted a full section of its annual publication, "Mineral Resources of the United States," to sand and gravel. The publication described the increase in production of sand and gravel since 1904, culminating in a reported yield of more than 79 million tons in 1914, which was valued at close to $24 million.[5] Department of the Interior, Mineral Resources of the United States 1914, at 271 (1916).

In succeeding years, the publication on mineral resources continued to analyze the sand and gravel industry. The government report for 1916 noted that "the production of sand and gravel was unprecedentedly large. All kinds of sands increased in total value . . . . From many parts of the country it was reported by producers that they could not get enough men to operate at the desired capacity or enough cars to meet their requirements." Mineral Resources of the United States 1916, at 327 (1919). In 1917, the production of sand and gravel in the United States was valued at more than $35 million.[6] Mineral Resources of the United States 1917, at 381 (1920). The Department of the Interior noted that "[o]nly four natural nonmetallic minerals produced in the United States . . . show a greater annual value than that of sand and gravel." *Id.*

Even acknowledging that sand and gravel were valuable in some areas at the time of enactment, BedRoc contends,

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[5] Something worth $24 million in 1914 would have been worth $423 million in 2001. *See* John J. McCusker, "Comparing the Purchasing Power of Money in the United States (or Colonies) from 1665 to Any Other Year Including the Present," Economic History Services, 2001, *available at* http://www.eh.net/hmit/ ppowerusd.

[6] In 2001, this amount of sand and gravel was worth more than $570 million. *See id.*

there could have been no viable market for the sand and gravel in *this* parcel at the time of *this* patent. BedRoc urges that we apply a site-specific analysis to determine whether a resource is "valuable." As support for that proposition, BedRoc argues that the term "valuable minerals" has the same meaning as the term "valuable mineral deposits" in the General Mining Act of 1872 (General Mining Law). That law determines how minerals are disposed of when they are discovered on public lands. 30 U.S.C. § 22 et seq.

According to BedRoc, Congress meant "valuable" to limit the reservation of rights to minerals that would be locatable under the General Mining Law. It follows, BedRoc urges, that we should determine whether sand and gravel are "valuable minerals" under the Pittman Act in the same way that we would determine whether a claimant had discovered "valuable mineral deposits" under the General Mining Law. Under the General Mining Law, we consider whether land contains "valuable mineral deposits" through application of the "prudent-man test." *W. Nuclear,* 462 U.S. at 58 n. 18, 103 S. Ct. 2218. In other words, we ask whether the challenged mineral deposit is the kind that would lead a prudent person to believe that a commercially viable mine could be operated with respect to that deposit. *Id.* Because that question is essentially factual, BedRoc argues that summary judgment was inappropriate.

We disagree with BedRoc's assertion that the two statutes refer to the same concept. The term "valuable" is used differently in the General Mining Law than in the Pittman Act. In the General Mining Law, the key phrase is "valuable mineral *deposits.*" 30 U.S.C. § 22 (emphasis added). The adjective "valuable" does not modify the noun "minerals" as in the Pittman Act; rather, it modifies the noun "deposits," and the word "mineral" also modifies "deposits."

The two terms – "valuable minerals" and "valuable mineral deposits" – are not synonymous. Not every deposit of minerals – no matter how "valuable" the mineral itself may be – is sufficient to constitute a "valuable mineral deposit" under the General Mining Law. A gold or silver deposit undoubtedly is made up of "valuable minerals" but, unless the deposit is significant enough and accessible enough to justify the expense of extraction, it is not a "valuable mineral deposit" under the General Mining Law. *See W. Nuclear,* 462 U.S. at 58 n. 18, 103 S. Ct. 2218 (discussing the standard).[7]

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[7] Even if we were to accept BedRoc's argument that "valuable minerals" and "valuable mineral deposits" were synonymous, it would not lead to the conclusion that BedRoc seeks. To the contrary, the General Mining Law would provide further support for our decision that sand and gravel were considered "valuable minerals" in the first half of the 20th Century. In 1955, the General Mining Law was amended specifically to exclude sand and gravel from substances locatable under those laws. That amendment provides:

> No deposit of common varieties of sand . . . [or] gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws . . . .

30 U.S.C. § 611. In *Western Nuclear,* the Court found the 1955 amendment "highly pertinent" and interpreted it to mean that, before its adoption, sand and gravel *were* locatable under the mining laws. 462 U.S. at 57 & n. 15, 103 S. Ct. 2218. In other words, *before 1955,* a deposit of sand and gravel large enough to justify commercial extraction could have been a "valuable mineral deposit" under the General Mining Law. Because the Act in this case refers to "valuable minerals," the 1955 amendment removing sand and gravel deposits from the scope of "valuable mineral deposits" would seem to suggest that, before 1955, sand and gravel were considered "valuable

(continued...)

Moreover, we disagree with BedRoc's contention that the question here is factual and site-specific. Rather, as in *Western Nuclear,* the question is a straightforward legal one regarding congressional intent as to the scope of the mineral reservation contained in the statute. *Id.* at 53-056, 103 S. Ct. 2218. When a mineral reservation is part of the statute itself, we follow the Supreme Court's lead and interpret that reservation using the usual tools of statutory construction. *Id.; cf. United States v. Hess,* 194 F.3d 1164, 1170-72 (10th Cir. 1999) (construing the scope of a reservation in a patent issued under the Indian Reorganization Act (IRA) and distinguishing *Western Nuclear* on the ground that the IRA itself did not contain a mineral reservation).

The prudent-person test makes sense when trying to decide whether a claimant has located a vein or lode of minerals that is sufficient to satisfy the requirements for a mining claim on federal land. *See* 30 U.S.C. § 22. The concept of "value" defines the deposit and thus the commercial viability of the claim. However, it does not follow that the United States meant to impose this same constraint upon itself when it reserved "all the coal and other valuable minerals" under the Act. Had Congress intended to import the prudent-person test from the General Mining Law

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(...continued)

minerals" that, in large enough "deposits," were locatable under the mining laws. *See id.* at 57-58, 103 S. Ct. 2218 (collecting cases).

into the reservation of "valuable minerals" to the United States, it likely would have done so explicitly.

CONCLUSION

Based on the text, purposes, and legislative history of the Pittman Act, we hold that sand and gravel are "valuable minerals" reserved to the United States. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil Action No. CV-S-98-01012

BEDROC, LLC, a Nevada Limited Liability Company, and EARL WILLIAMS, an individual,

Plaintiffs-Counterdefendants,

v.

THE UNITED STATES OF AMERICA; Bruce Babbit, Secretary of the Interior; United States Department of the Interior; Bureau of Land Management; and Curtis L. Tucker, Area Manager, Caliente Resource Area, Bureau of Land Management,

Defendants-Counterclaimants.

ORDER

Presently before this Court is Plaintiffs BedRoc Limited, LLC's ("BedRoc") and Earl Williams' ("Williams") Motion for Summary Judgment (Doc. # 16), filed on February 1, 1999. In connection with this initial submission, BedRoc and Williams have also provided: (1) a Notice of Filing Facsimile Declaration (Doc. # 17) (filed on February 1, 1999); (2) a Notice of Filing Unsigned Declaration (Doc. # 19) (filed on February 1, 1999); (3) Errata to Memorandum

in Support of Motion for Summary Judgment (Doc. # 21) (filed on February 3, 1999); and (4) a Notice of Filing Original Declarations (Doc. # 22) (filed on February 8, 1999). Defendants United States of America, Interior Secretary Bruce Babbit, the Department of the Interior, the Bureau of Land Management ("BLM"), and BLM Area Manager Curtis L. Tucker (hereinafter labeled collectively as the "U.S. Government") filed a Brief in Support of Mineral Ownership and Opposition (Doc. # 26) on March 18, 1999.

The U.S. Government also filed a Brief on Mineral Ownership (Doc. # 20) on February 1, 1999. BedRoc and Williams filed a Response (Doc. # 27) on March 18, 1999.

I. INTRODUCTION

The development, exploitation and preservation of public land resources has played a key role in the development of the State of Nevada. In the course of this nation's history, Congress has passed literally thousands of public land laws in order to foster economic and social growth. *See Arthur R. Wallace,* 30 IBLA 239, 240 (1977). Many of these laws have become obsolete with the evolution of our republic. Today, this Court must discern the ambit of one of these now-defunct statutes, the Pittman Underground Water Act, in order to determine whether Defendant U.S. Government or Plaintiffs BedRoc and Williams have ownership rights to deposits of sand and gravel located on formerly public lands. After examining the Act's legislative history and utilizing other tools of statutory construction, this Court concludes that the deposits are the reserved property of the United States.

II. BACKGROUND

A. The Pittman Underground Water Act

In 1910, the population of the State of Nevada numbered only 81,875. *See* H.R. Rep. No. 63-1418, at 2 (1915). One of the main impediments to population growth was a lack of artesian water sources. *See id.* The Pittman Underground Water Act, 43 U.S.C.A. §§ 351-360 (West 1964), repealed by Pub. L. No. 88-417, § 1, 78 Stat. 389 (1964) (hereinafter the "Pittman Act"), was specifically designed to address this problem. The Secretary of the Interior was authorized to issue permits, not to exceed two years, providing the exclusive right "to drill or otherwise explore for water beneath the surface ... of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply." Pittman Act § 1.

To acquire such permits, potential settlers were required to file affidavits averring that their applications were made "honestly and in good faith ... for the purpose of reclamation and cultivation." Pittman Act § 2. Upon the applicant's successful demonstration that he or she could irrigate at least twenty acres of the permitted parcel, the applicant would receive a land patent of up to 640 acres as a reward. *See* Pittman Act § 5. However, any acquired land was controlled by the following mineral reservation:

> [A]ll entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be

> subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Pittman Act § 8.

From its inception, the legislation was acknowledged as being somewhat experimental. *See* 58 Cong. Rec. H6468, H6468 (1919) (statements of Rep. Evans). Ultimately, the experiment was labeled a failure. In 1964, Congress repealed the Pittman Act due to its inability to promote agricultural development in Nevada. *See* S. Rep. No. 88-1282, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2699, 2699 (noting creation of only negligible amounts of crop land and "ill-advised" applications).

B. Factual and Procedural Background

On March 12, 1940, BedRoc's and Williams' predecessor-in-interest acquired the patent to the surface estate of 560 acres of land, located in Lincoln County, Nevada, under the Pittman Act. (*See* Patent, attached as Ex. 1 to Defs.' Brief on Mineral Ownership, Doc. # 20.) Before receiving this patent, the Director of the Geological Survey certified the land as nonmineral in nature and recommended its disposal under the Pittman Act. (*See* Letter from Director, U.S. Geo-logical Survey, to the Secretary of the Interior, attached as Ex. 9, Pls.' Mot. for S.J., Doc. # 16.) This nonmineral designation was approved on behalf of the Secretary on October 5, 1934. (*See* Approval Notation, dated Oct. 5, 1934, by First Assist. Secretary of the Interior T.A. Walters on Letter from Director, U.S. Geological Survey, to the Secretary of the Interior, at 2.)

After a number of changes in ownership, the tract of real property was purchased by Williams on February 24, 1993. Soon thereafter, Williams began to extract sand and gravel

from deposits on his land. (*See* Patricia Richards Decl., attached as Ex. 5 to Pls.' Mot. for S.J., Doc. # 16.) These deposits became the focus of an ownership dispute between the Department of the Interior and BedRoc and Williams.

The BLM, a division of the Department of the Interior, issued to Williams two notices of trespass on March 26, 1993, and April 1, 1993, for the removal and sale of the sand and gravel. The BLM issued these notices according to its interpretation of the Pittman Act's reservation of "valuable minerals" as including deposits of such substances. After corresponding with Williams, the BLM issued a Decision on April 23, 1993, finding that Williams had removed and sold federally-owned minerals without the benefit of a mineral contract and was liable for future damages under 43 C.F.R. § 9230.0-7. (*See* Decision at 1, attached as Ex. 4 to Defs.' Brief on Mineral Ownership, Doc. # 20.) The BLM based its decision, in part, on *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983), where the Supreme Court found that sand and gravel were minerals reserved to the United States under the Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. 94-579, § 102, 90 Stat. 2744 (1976). (*See* Decision at 1.)

The BLM Decision against Williams was upheld on appeal by the Interior Board of Land Appeals (the "IBLA"), albeit on the basis of the Pittman Act's legislative history and intent, not by analogy to the Stock-Raising Homestead Act. Williams now seeks a determination from this Court that the IBLA and BLM proceedings constituted "arbitrary and capricious" proceedings in violation of section 1(e) of the Administrative Procedures Act, 5 U.S.C. § 706, due to their erroneous interpretation of the disputed sand and gravel as "valuable minerals" reserved to the United States under the Pittman Act. (*See* Complaint, Doc. # 1.)

In the midst of these proceedings, BedRoc acquired the real property from Williams on July 27, 1995. BedRoc continued the removal and sale of the extant sand and gravel deposits. The Department of the Interior similarly asserted claims to these deposits against BedRoc as well. After some litigation, BedRoc was permitted to continue to remove these deposits pursuant to a stipulation with the Department of the Interior. (*See* Stipulation, attached as Ex. 7 to Pls.' Mot. for S.J., Doc. # 20.) The Stipulation, *inter alia*, required BedRoc to deposit a sum of money for each cubic yard of sand or gravel removed, pending final resolution of the title dispute to the deposits. (*See id.*) BedRoc now seeks summary judgment quieting title to the disputed real property and its sand and gravel deposits. (*See* Complaint, Doc. # 1.)

BedRoc's and Williams' claims were joined pursuant to Federal Rule of Civil Procedure 20. *See Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1375 (9th Cir. 1980). In opposing BedRoc's and Williams' claims, the U.S. Government has counter-moved for summary adjudication, seeking a declaration that it is the reserved owner of the deposits. (*See* Defs.' Brief & Opp., Doc. # 26.)

III. DISCUSSION

Determination of the parties' ownership rights to the sand and gravel deposits depends upon whether the disputed sand and gravel constitute "valuable minerals" reserved to the U.S. Government under the Pittman Act. Resolution of this question requires this Court to determine: (1) whether sand and gravel constituted "minerals" for purposes of the Pittman Act; (2) if so, whether they constituted "valuable" minerals; and (3) what effect, if any, the U.S. Geological Survey's nonmineral certification had on the status of the disputed resources.

When determining the meaning of a statute, a federal court must first look to the plain and ordinary meaning of both the disputed language and the statute as a whole. *See Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1201 (9th Cir. 1998). But when the text is ambiguous, the court should examine the statute's legislative history and employ other extrinsic aids in order to divine the statute's meaning. *See Moyle v. Director, Office of Workers' Compensation Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998).

The matter before this Court defies simple resolution through a plain meaning analysis. The parties vigorously disagree as to whether the term "mineral" commonly includes substances such as sand and gravel. In contexts outside the Pittman Act, there has been considerable dispute as to this very issue. *Compare Webster's New World College Dictionary* 863 (3d ed. 1996) (defining "mineral" as "an inorganic substance occurring naturally in the earth and having a consistent and distinctive set of physical properties . . . [or] any substance that is neither vegetable nor animal") *with Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1003-04 (Wyo. 1988) (sand and gravel not "minerals" within natural meaning of word); *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994, 997 (1949) (same).

Resort to the Pittman Act's legislative history and other tools of statutory construction, however, is more informative. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the Supreme Court held that where a statute is silent or ambiguous as to a specific issue, a federal court must defer to a permissible agency interpretation unless it is arbitrary or capricious. In this light, the Department of the Interior's characterization of sand and gravel as "minerals" (*see Earl Williams*, 140 IBLA

295, 302-14 (1997)) under the Pittman Act withstands scrutiny. The Department of the Interior has tracked national sand and gravel production as part of its annual mineral report since at least 1914 (viz., before the promulgation of the Pittman Act). (*See* U.S. Geological Survey, Mineral Resources of the United States 271-83 (1914-19), attached as Exs. 1-6 to Def.'s Opp., Doc. # 26). Moreover, notwithstanding BedRoc's and Williams' reliance on interpretations of written instruments between private parties, *see e.g. Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App. 1962, writ refused n.r.e.); *Farrell v. Sayre*, 129 Colo. 368, 270 P.2d 190 (1954), federal courts have held that common varieties of gravel are "minerals" for purposes of pre-1955 federal mining claims and the Stock-Raising and Homestead Act of 1916. *See Watt*, 462 U.S. 36, 57-58, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983) and cases cited therein.

More problematic, however, is the question of whether the sand and gravel at issue constitute "valuable" minerals for purposes of the Pittman Act. BedRoc and Williams argue that the Pittman Act's term "valuable minerals" should be construed in the same fashion as the term "valuable mineral deposits" in the Mining Law of 1872. *See* 30 U.S.C. § 22. Under the Mining Law, mineral deposits are "valuable" only if they are reasonably marketable or profitable at the time of a patent's issuance. *See United States v. Coleman*, 390 U.S. 599, 602, 88 S. Ct. 1327, 20 L. Ed. 2d 170 (1968); *Lara v. Secretary of Interior of United States*, 820 F.2d 1535, 1541 (9th Cir. 1987). Thus, BedRoc and Williams argue that the sand and gravel deposits on the property were never reserved to the government, since they could not have been profitably mined and marketed in the 1940's (i.e. immediately after the predecessor-in-interest's receipt of a Final Certificate on August 29, 1939). (*See* Pls.' Mot. for S.J., Doc. # 16, Ex. 1.) This is an argument that this Court declines to accept.

It is true that, as BedRoc and Williams contend, "where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense unless the context requires the contrary." *See Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115, 60 S. Ct. 1, 84 L. Ed. 110 (1939) (citation omitted). But this Court agrees with the Interior Board of Land Appeal insofar as it held that reference to a single analogous, but unrelated, statute is an unreliable method of divining legislative intent. *See Williams,* 140 IBLA at 303 (citing Norman J. Singer, 2B Sutherland Stat. Const. § 53.05 (5th ed. 1992)). Such references are of significant value only where "analogy is made to several statutes or a general course of legislation." *Id.* When plentiful sister statutes are absent, as in the case *sub judice,* it is best to examine the legislative history and purpose of the disputed statute to discern Congressional intent. *See Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995); *Singer, supra,* § 46.07.

Perusal of the Pittman Act's legislative history reveals that Congress did not contemplate the fee simple conveyance of substances such as sand and gravel. First, Congress specifically stated that the Pittman Act's purpose was "to encourage the exploration for and development of artesian and subsurface waters in the State of Nevada." *See* H.R. Rep. No. 66-286, at 1 (1919). Contrary to the BedRoc's and Williams' assertions, however, such activity was meant to reward the husbandry of livestock and crops. *See id.* (stating that bill would remedy prior retardation of "agricultural development in Nevada"); Letter from Alexander T. Vogelsang, Acting Secretary, Department of the Interior, to Senator Reed Smoot, Chairman, Committee on Public Lands (June 24, 1919), *printed in* S. Rep. No. 66-66, at 2 (1919) (stating that bill would ensure that land is "made available for agricultural purposes"). Indeed, Congress repealed the

Act forty years later specifically for its paltry creation of only "three economic farm units." *See* S. Rep. No. 88-1282, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2699, 2699.

Secondly, the Pittman Act's sponsor, Senator Pittman of Nevada, explicitly stated that the bill was intended to reserve all mineral rights to the Government. The remarks of the sponsor of language ultimately promulgated into law are an authoritative guide to a statute's construction. *See North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 526-27, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982); *United States v. Otherson,* 637 F.2d 1276, 1283 (9th Cir. 1980). During an exchange with Senator Thomas of Colorado, Senator Pittman explained that the reservation clause was meant to reserve to the United States the full spectrum of minerals:

> Mr. THOMAS. Mr. President, section 6 of the proposed bill provides for the reservation from the operating clause of the patent of "all the coal and other valuable minerals in the lands so entered and patented." I wish to inquire of the Senator from Nevada whether that reservation is broad enough, or is intended to be broad enough, to include veins of gold, silver, lead, and other metalliferous deposits?
>
> Mr. PITTMAN. In line 25, at the bottom of page 3, in section 6, the bill says:
>
> The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.
>
> Mr. THOMAS. If it does include that class of deposits, I can foresee a great deal of complication and trouble arising from the attempt to prospect for valuable mineral deposits on these lands under the

mining act of 1872 . . . . I believe it would be very much better for the Government, for the prospector, and for the operator under the provisions of this bill, if there were no such exception; and I shall therefore offer an amendment to eliminate section 6 from the bill.

Mr. PITTMAN. Mr. President, before the Senator does that, I trust that he will consider the matter for a minute. This bill, as it was originally prepared by me, did not contain that reservation. When a similar bill was introduced in the House of Representatives, at my request, it met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands. There was not the slightest chance on earth of passing such a bill through the House of Representatives if there was the slightest suspicion that the bill could be used for the *purpose of acquiring mineral lands under the guise of obtaining agricultural lands.* This reservation from all characters of agricultural entries is usual; and, *without discussing the question of whether or not it is a good provision, I must say that it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry.*

53 Cong. Rec. S705, S707 (1916) (emphasis added). Following this exchange, Senator Thomas' amendment to strike the reservation clause was rejected. *See id.* at S712.

In light of these Congressional proceedings, this Court is not persuaded by BedRoc's and Williams' contention that the reservation of only "valuable" minerals would exclude substances such as sand or gravel. "The cardinal principle of statutory construction is to save and not to destroy. It is [a court's] duty to give effect, if possible, to every clause and

word of a statute . . . ." *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (quotation omitted). However, this doctrine must be executed in a manner that advances and reflects the legislative history and purpose of the act. *See Estate of Reynolds v. Martin,* 985 F.2d 470, 473 (9th Cir. 1993); *United States v. Canals-Jimenez,* 943 F.2d 1284, 1287 (11th Cir. 1991). In view of Congressional hostility to fraudulent acquisitions of *any* mineral resources under the guise of agricultural land patents, it seems that the reference to "valuable" minerals merely implicates substances with desirable uses. *Cf. Northern Pac. Ry. Co. v. Soderberg,* 188 U.S. 526, 536-37, 23 S. Ct. 365, 47 L. Ed. 575 (1903) (discerning legislative intent to reserve geological deposits useful to the arts or manufacturing processes). Sand and gravel are obviously substances widely used in this nation's industrial pursuits. *See, e.g.,* Daniel C. Brown, *Porous Pavement,* Pit & Quarry, May 1, 1995, *available in* 1995 WL 12499285. Thus, it seems logical to place these sub-stances within the ambit of the term "valuable minerals." Alternatively, even if a literal reading of the term would suggest a limiting construction, this Court must again eschew such an interpretation where it lies contrary to legislative intent. *See* Singer, *supra,* § 46.07.

BedRoc's and Williams' reliance on the real property's nonmineral designation is similarly misplaced. BedRoc and Williams contend that the nonmineral designation in 1934 (*see* Letter from Director, U.S. Geological Survey, to the Secretary of the Interior, Pls.' Mot. for S.J., Ex. 9, Doc. # 16.) indicates that the U.S. Government did not consider sand and gravel to be reserved substances under the Pittman Act. Prior to conveyance, Pittman Act patents were limited to "unreserved, unappropriated, nonmineral, nontimbered public lands." *See* H. Rep. No. 66-286, at 1. However, the

U.S. Supreme Court has observed that the term "mineral lands" traditionally included those lands that were "chiefly" valuable for their mineral deposits. *See Northern Pac. R. Co.*, 188 U.S. at 536-37, 23 S. Ct. 365. Thus, it seems that if a parcel of land was adjudged valuable mainly for its non-mining purposes (e.g. agricultural exploitation) at the time of certification, it could be labeled "nonmineral," notwithstanding the actual presence of mineral substances reserved to the Government. Indeed, the legislative debates clearly bear out this interpretation. Representative Evans of Nevada and Representative Kinkaid of Nebraska, who presented the proposed Pittman bill to the U.S. House of Representatives, clarified this seeming contradiction:

> Mr. BLANTON: Mr. Speaker, re-serving the right to object, will the gentleman permit and agree to an amendment to reserve the mineral rights of the Government?
>
> Mr. KINKAID: They are reserved.
>
> Mr. EVANS: They are already reserved.
>
> Mr. BLANTON. The way I caught the bill it just spoke of the lands as nonmineral lands. Many lands classified as nonmineral and nonagricultural lands are, as a matter of fact, mineral and agricultural in some instances.
>
> Mr. TAYLOR of Colorado. Those reservations are made now by general law. It is not necessary to put that in. You cannot get oil land by homesteading nowadays.
>
> Mr. BLANTON. Is it all reserved?
>
> Mr. TAYLOR of Colorado. Yes.

> Mr. BLANTON. These lands come under the general reservation?
>
> Mr. TAYLOR. Yes.
>
> Mr. BLANTON. These homesteads to-day do not contain any oil?
>
> Mr. TAYLOR of Colorado. When you get a homestead, you do not get any oil under it. The oil that may be underneath it is reserved.
>
> Mr. BLANTON. This is not with respect to any homestead rights. It carries with it the right to exploitation with regard to the reclaiming of arid lands.
>
> Mr. TAYLOR of Colorado. Yes; by expending a lot of money and digging an artesian well.
>
> Mr. BLANTON. If the mineral rights are properly reserved, I have no objection.
>
> Mr. EVANS of Nevada. They are properly reserved. I am glad the gentleman has asked the question.

58 Cong. Rec. H6468, H6469 (1919). The statements of the committeeman in charge of presenting a bill to the House should be "taken as the opinion of the committee about the meaning of the bill." Singer, *supra*, § 48.14. Thus, BedRoc's and Williams' reliance on the nonmineral certification are otiose to the issue of sand and gravel ownership.[1]

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[1] The Court also finds irrelevant BedRoc's and Williams' strenuous claims that the sand and gravel were exposed, rather than

(continued...)

The Court's findings are reinforced by the "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *See Watt,* 462 U.S. at 59, 103 S. Ct. 2218 (quotations omitted). BedRoc's and Williams' protestations for a more liberal application of this doctrine are unfounded. A looser standard may apply only to federal inducements to "'undertake and accomplish great and expensive enterprises or works of a quasi-public character,'" such as those required in the construction of the railroads. *Leo Sheep Co. v. United States,* 440 U.S. 668, 683, 99 S. Ct. 1403, 59 L. Ed. 2d 677 (1979) (quoting *United States v. Denver & Rio Grande Ry.,*

(...continued)

subsurface, deposits. (*See* Pls.' Mot. for S.J., Doc. # 16, at 15.) Senator Pittman made clear that a deposit's location did not affect the Government's rights:

> [I]f these minerals are disclosed on the surface of the ground, the ground is not subject to this bill. If they are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the Government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of coal or other valuable minerals that are apparently concealed under the surface, but are known to the entryman.

53 Cong. Rec. S705, S707 (1916).

150 U.S. 1, 14, 14 S. Ct. 11, 37 L. Ed. 975 (1893)). Patents under the Pittman Act, while certainly of benefit to Nevada agricultural production and state population growth, do not rise to the level of the mammoth construction efforts and great transformational effects railroad systems have played in our nation's history. *See, e.g.* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present,* 31 Am. Bus. L. J. 553, 579-82 (1994) (noting national economic effects of railroad construction).

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs BedRoc Limited, LLC's and Earl Williams' Motion for Summary Judgment (Doc. # 16) is DENIED.

IT IS FURTHER ORDERED that Defendants United States of America's, Interior Secretary Bruce Babbit's, the Department of the Interior's, the Bureau of Land Management's, and Area Manager Curtis L. Tucker's Brief in Support of Mineral Ownership and Opposition (Doc. # 26), requesting a judicial declaration finding the United States to be the owner of all valuable minerals underlying BedRoc's real property, including the sand and gravel deposits, is GRANTED, and that Judgment is hereby entered in favor of Defendant/Counterclaimants United States of America, Interior Secretary Bruce Babbit, the United States Department of the Interior, the Bureau of Land Management, and Curtis L. Tucker and against Plaintiff/Counterdefendants BedRoc Limited, LLC and Earl Williams.

/s/ Philip M. Pro
CHIEF JUDGE
UNITED STATES DISTRICT COURT

LAS VEGAS, NEVADA

MAY 24, 1999

APPENDIX C

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals

EARL WILLIAMS

IBLA 93-414

Decided October 6, 1997

MULLEN, *Administrative Judge:*

Earl Williams has appealed an April 23, 1993, Decision issued by the Area Manager, Caliente Resource Area, Nevada, Bureau of Land Management (BLM or Bureau), finding Williams had committed mineral material trespass when he removed sand and gravel from a 560-acre tract of land owned by Williams.[1] The Decision was based upon a

[1] A deed executed by Franklin B. and Mary B. Snyder on Feb. 24, 1993, conveyed the tract to Earl C. Williams and Ruth Williams. Earl and Ruth Williams conveyed the tract to the Ron and Lynn Williams Family Trust on Mar. 8, 1993. Earl and Ruth Williams also executed a Short Form Deed of Trust to Robert W. Steadman, Trustee, Steadman Trust, on Mar. 18, 1993. In an Oct. 27, 1993, letter to the Assistant Regional Solicitor, counsel for Williams states that the deed dated Mar. 8, 1993, was not recorded until May 7,

(continued...)

finding that the Pittman Act patent of the tract reserved the minerals to the United States.[2]

The land owned by Williams is situated in the E 1/2, E 1/2 W 1/2 sec. 24 and the E 1/2 NE 1/4 sec. 25, T. 11 S., R. 62 E., Mount Diablo Meridian, Lincoln County, Nevada. The surface estate of this tract was conveyed to Williams' predecessor-in-interest pursuant to the Pittman Act by United States Patent No. 1107339 issued March 12, 1940. Section 8 of the Pittman Act reserved to the United States "all the coal and other valuable minerals in the lands so entered and patented."

The Bureau issued notices of trespass for the removal and sale of sand and gravel on March 26, 1993, and April 1,

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(...continued)

1993. Counsel asserts that title was vested in Williams when the trespass notices were issued and that Williams has standing to appeal.

[2] The Act of Oct. 22, 1919, 41 Stat. 293-295; 43 U.S.C. §§ 351-355 (1958), is commonly referred to as the Pittman Act or the Pittman Underground Water Act of 1919. By Act of Sept. 22, 1922, 42 Stat. 1012, 43 U.S.C. § 356 (1958), Congress authorized the Secretary of the Interior to grant extensions of time "not exceeding two years" to permittees under the Pittman Act for "beginning, recommencement, or completion" of operations for the development of underground waters. The Pittman Act was repealed by the Act of Aug. 11, 1964, Pub. L. No. 88-417, 78 Stat. 389, subject to valid existing rights and obligations, and without prejudice to the processing of valid applications for permits on file at that date. See 29 Fed. Reg. 13387 (Sept. 26, 1964).

1993. On April 13, 1993, Williams met with BLM and questioned BLM's determination that the sand and gravel he had removed was "valuable mineral" within the meaning of the reservation in the patent. At BLM's request, Williams submitted an April 16, 1993, letter stating that "[t]his property is my own personal property and I do not feel that these are valuable minerals. Once we remove the over burdens and the fact that it is 70 miles from Las Vegas, it is not valuable to anyone."

After considering Williams' response, BLM issued its April 23, 1993, Decision that Williams removed and sold Federally owned mineral material without the benefit of a mineral materials contract. In its Decision, BLM cited *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983), to support its conclusion that the sand and gravel deposit on Williams' property was reserved to the United States. In Western Nuclear, the Supreme Court found sand and gravel to be "mineral reserved to the United States in lands patented under the SRHA [Stock-Raising Homestead Act]." Id.[3] The Bureau also found Williams in violation of 43 C.F.R. § 9239.0-7, which provides:

> The extraction, severance, injury, or removal of . . . mineral materials from public lands under the

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[3] The Act of Dec. 29, 1916, 39 Stat. 862, 43 U.S.C. §§ 291-301 (1970), as amended, popularly known as the "Stock-Raising Homestead Act," was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. . No. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787. Section 701(a) of FLPMA provided that "[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."

> jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

Williams' trespass was deemed to be innocent. However, Williams was also advised that he should cease sand and gravel removal immediately, and that continued removal without a mineral materials contract would be considered willful trespass.[4]

On appeal, Williams contends that when the Government issued a Final Certificate on August 29, 1939, and Patent No. 1107339 on March 12, 1940, his predecessors-in-interest acquired the sand and gravel. The patent was issued pursuant to the Pittman Act, which provides in pertinent part:

> That the Secretary of the Interior is hereby authorized to grant to any citizen . . . a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface . . . of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply . . . And pro-vided further, That said land shall theretofore have been designated by the

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[4] On June 14, 1993, the Assistant Regional Solicitor submitted a stipulation entered into by Williams and BLM permitting continued production of sand and gravel pending appeal.

> Secretary of the Interior as subject to disposal under the provisions of this act.
>
> SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate the lands subject to disposal under the provisions of this act: Provided, however, That where any person . . . qualified to receive a permit under the provisions of this act shall make application for such permit upon land which has not been designated as subject to disposal under the provisions of this act . . . such application . . . shall be . . . suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.
>
> . . . .
>
> SEC. 8. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

In his Statement of Reasons (SOR), Williams contends that BLM's reliance upon *Watt v. Western Nuclear, Inc.*,

supra, is misplaced because the Court's interpretation of the SRHA in *Western Nuclear* is not applicable to Pittman Act entries or patents. (SOR at 4.) He argues that no land entry could be made under the Pittman Act until after the land had been deemed to be "nonmineral," noting that if an application for a permit was filed for land which had not been designated as nonmineral, the application was suspended until the land had been designated nonmineral in character, and an application would be rejected if the land was found to be "mineral in character." Williams further argues that only "valuable minerals," locatable under the 1872 mining laws, were reserved to the Federal Government in a Pittman Act patent. (SOR at 4-7.)

Williams notes that on October 2, 1934, the Director of the Geological Survey certified that the land patented to Williams' predecessor-in-interest was nonmineral and recommended designating it as suitable for disposal under the Pittman Act. (SOR at 7; Appellant's Exhibit (Ex.) 1: Letter dated Oct. 2, 1934, from the Director, U.S. Geological Survey, to the Secretary of the Interior.) The nonmineral designation was approved on behalf of the Secretary on October 5, 1934. (Appellant's Ex. 1: Notation dated Oct. 5, 1934, by First Assistant Secretary of the Interior T.A. Walters on Letter dated Oct. 2, 1934, from the Director, U.S. Geological Survey, to the Secretary of the Interior, at 2.) Williams contends that after this designation was approved, a filing of final proof and issuance and approval of the Final Certificate rendered the nonmineral designation irrevocable. Williams reasons that this designation rendered the mineral reservation in the patent inoperative. (SOR at 8.) He concludes that if Congress had intended to reserve all minerals from Pittman Act patents, including minerals discovered after patent issued, it would have expressed an intent to do so. (SOR at 10.) Williams

urges a finding that a patent issued pursuant to the Pittman Act conveyed all minerals not known to exist when the equitable title vested in the patent recipient. (SOR at 10-11.)

Williams contends that the difference between the SRHA reservation of "all the coal and other minerals," and the Pittman Act reservation of "all the coal and other valuable minerals," is significant. He asserts that "valuable minerals," other than coal, were locatable under the 1872 mining laws. He then argues that the sand and gravel deposit on his land had no special value when the land was taken to patent, and was therefore not locatable under the 1872 mining laws at that time, and that the land was properly identified as not being mineral in character. This characterization agrees with the conclusion made by the Director of the U.S. Geological Survey when the Director declared the land to be nonmineral. Williams contends that, as a result of this determination, the sand and gravel on his land was not included in the mineral reservation found in the patent. Williams argues that the term "valuable minerals" distinguishes the Pittman Act reservation from the reservation found in SRHA patents, which extends to all other minerals, regardless of their value at the time of patent. (SOR at 11-12.)

As further support for his argument that the SRHA and Pittman Act mineral reservations are not analogous, Williams notes that an SRHA "entry" could be made on any "unreserved public land" including mineral land, and that "all the coal and other minerals" were reserved to the United States. Williams notes that this procedure differs materially from the procedure for making an entry pursuant to the Pittman Act, because the Pittman Act prohibited "entry" unless and until the land had been designated nonmineral. (SOR at 12-13.)

Williams contends that the true test of whether a mineral deposit is owned by the Federal Government is whether the mineral deposit was locatable under the 1872 mining laws when the Pittman Act permit was issued. (SOR at 15.) He notes that the Materials Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1994), excluded deposits of sand and gravel and other named minerals materials from location under the 1872 mining laws, and after the passage of the Materials Act of July 31, 1947, sand and gravel deposits were not "valuable deposits" that could be located under the 1872 mining laws unless they had some property or characteristic that gave them a special value. Williams asserts that between October 22, 1919 (the date of enactment of the Pittman Act) and July 31, 1947 (the date of the Materials Act) sand and gravel and other common varieties were not locatable under the 1872 mining laws unless they had distinct characteristics giving them special value. Therefore, Williams reasons, if any entry was allowed, and final certificate or patent issued prior to 1947, the Pittman Act mineral reservation would not have included sand, gravel, or other "common varieties" if the deposits were not known to have special values, including a profitable market, prior to issuance of final certificate. Williams asserts that the final certificate, entry, and patent to his land all predate the 1947 Act, and if BLM cannot demonstrate that a valuable deposit of sand and gravel was known to exist prior to issuance of the final certificate, the statutory mineral reservation does not include sand and gravel. (SOR at 15-16.)

Mineral material cannot be removed from lands administered by BLM without prior authorization in the form of a mineral material sales agreement or permit issued under the Materials Act of July 31, 1947, 30 U.S.C. §§ 601, 602 (1994), and Departmental regulations. *See Richard Connie*

Nielson v. BLM, 125 IBLA 353, 363 (1993); *Frehner Construction Co.*, 124 IBLA 310 (1992); *Curtis Sand & Gravel Co.*, 95 IBLA 144, 161, 94 Interior Dec. 1, 10 (1987). Williams does not contend that BLM had authorized the removal of the sand and gravel, and the sole question on appeal is the ownership of the sand and gravel. The answer to that question depends on whether the sand and gravel was reserved when the land was patented. The question of the ownership of sand and gravel on lands patented under the Pittman Act is one of first impression.

The BLM Decision assumes a connection between the mineral reservation provisions of section 9 of the SRHA and section 8 of the Pittman Act. An examination of the provisions of the two Acts shows that they are similarly structured and contain similar language. The Bureau apparently concluded that the Supreme Court's holding in *Western Nuclear* construing section 9 of the SRHA and finding sand and gravel reserved in SRHA patents is also applicable to the mineral reservation in Pittman Act patents. (Decision at 1.) In our view, we cannot rely on *Watt v. Western Nuclear, Inc., supra*, to support BLM's Decision, because the holding in *Watt v. Western Nuclear, Inc.* applies to the reservation of sand and gravel in patents issued pursuant to the SRHA and does not reflect consideration of the ownership of sand and gravel in lands patented under the Pittman Act.

We conclude that sand and gravel was reserved to the United States in Pittman Act patents. Our conclusion is based on the intent of Congress, as reflected in the legislative history of that Act.

It is a well established rule of statutory construction that reliance on analogous legislation is of limited probative value when interpreting the intent of lawmakers:

> Caution must be exercised in applying the rule that one statute will be interpreted to correspond to analogous but unrelated statutes for the reason that by way of contrast an inclusion or exclusion may show an intent or convey a meaning exactly contrary to that expressed by analogous legislation. Therefore, the rule tends to be of greater value where analogy is made to several statutes or a general course of legislation.
>
> The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means of discerning legislative intent. Consequently, the chief value of the rule is to be found in the fact that it serves as a criterion for showing the general course of legislative policy. (Footnotes omitted.)

Norman J. Singer, 2B Sutherland Stat Const § 53.05 (5th ed. 1992). Two additional canons of statutory construction should be considered at this point in our analysis. First, because "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, . . . each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, 2A Sutherland Stat Const § 46.05 (5th ed. 1992). Second, although the plain meaning rule focuses on the importance of a literal reading of the language of a statute, a "literal interpretation of the words . . . should not prevail if it creates a result contrary to the apparent intention of the legislature[.]" Id. at § 46.07. At the same time, the language and structure of a statute should be carefully considered, especially when the Act being considered is derived from carefully considered legislative compromises. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 748 n.14 (1989).

The legislative record indicates that the mineral reservation provisions of the Pittman Act were neither accidental inclusions nor mere boilerplate. They were carefully crafted and thoroughly debated by the Congress. It is clear that Congress considered them to be a crucial part of the Act.

The record shows that Senator Key Pittman of Nevada introduced the precursor of the Pittman Underground Water Act of 1919 on December 29, 1914. That bill, known as S. 7109, was reported favorably unanimously by the Committee on Public Lands of the Senate on February 3, 1915. S. Rep. No. 64-4, at 1 (1915). An identical bill, known as H.R. 21377, was introduced in the House of Representatives by Representative Carl Hayden of Arizona, at the request of Mr. Pittman. The House version, H.R. 21377, was referred to the Committee on Public Lands, which reported it favorably, with amendments, on February 18, 1915.[5] H.R. Rep. No. 63-1418, at 2 (1915). The House Report describes H.R. 21377 as follows:

> The purpose of the bill is to encourage the discovery of artesian water on the public domain in the State of Nevada, without appropriation or expense on the part of the Government. The bill is

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[5] Neither S.7109 nor H.R. 21377 contained a provision reserving minerals to the United States. House bill No. 21377 was amended in committee to change the allocation of funds received at public auction from the sale of remaining lands not patented to Pittman Act permittees. Money received from the sale of the remaining lands was to be deposited in a reclamation fund pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 388. Several additional amendments were made in committee; none is at issue in this appeal.

local in effect and extends only to the State of Nevada, where peculiar conditions seem to require such form of development.

According to the census of 1910 the land of Nevada is segregated as follows:

	Acres
Total area	70,285,440
Reserved by the Government as forest reserves, Indian reservations, etc.	12,068,250
Held in private ownership	2,714,757
Unreserved and unappropriated	55,502,439

According to the census of 1910 the population of the State of Nevada is 81,875. There is very little surface water in the State and practically all that does exist has been appropriated. The future development of the agricultural land of the State seems to depend largely upon the development of artesian water. Congress has time and again refused to appropriate money for the exploration and development of artesian water, and therefore if the vast areas of arid lands in the State are to be developed it must be done through the individual and with private capital.

By reason of the peculiar condition that exists in the State it is not to be expected that the remaining great areas of public land will be developed under the homestead or other existing laws.

H.R. Rep. No. 63-1418, at 2 (1915). Secretary of the Interior Franklin K. Lane submitted reports to the Senate and House Committees recommending enactment of S.7109 and H.R. 21377 and observing:

> The large surface areas, small population, and comparatively small amount of assessable property at present in the State, together with the limited number of wagon roads, railroads, and other transportation facilities, indicate strongly the need of further development in this direction and the necessity of Federal assistance.

Letter dated Jan. 7, 1915, from Franklin K. Lane to Hon. Henry L. Myers, Chairman, Committee on Public Lands, United States Senate, as printed in H.R. Rep. No. 63-1418, at 2, 3 (1915). The bills identified as S.7109 and H.R. 21377 died without consideration upon the adjournment of the 63rd Congress. Senator Pittman introduced S.2519, a bill identical to S.7109, in the First Session of the 64th Congress. Senate Bill 2519 was reported favorably on December 17, 1915. As reported, the bill contained a provision enumerated as section 6, which is identical to the section 8 mineral reservation provision in the Pittman Act, when it was enacted by Congress on October 22, 1919.[6]

Senate Bill 2519 was considered by the Senate, sitting in Committee of the Whole, on January 8, 1916. Senator Pittman, the sponsor of the bill, was responsible for explaining the bill to his colleagues and managing debate. 54 Cong. Rec. 705 (1916). The floor debate is revealing and illustrates the careful consideration given by the Senate to

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[6] 53 Cong. Rec. S707 (1916).

the mineral reservation provision of S.2519 and the reasons Senator Pittman and the Committee on Public Lands saw fit to recommend its inclusion in the bill.[7]

The debate quickly focused on the intent, purpose, and scope of the mineral reservations in section 6 of S.2519. The

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[7] It is well settled that special import is accorded Senator Pittman's explanations and assertions. He was discussing a bill he had introduced and was also managing floor debate during the Senate consideration of that bill. See generally Norman J. Singer, 2A Sutherland Stat Const § 48.14 (5th ed. 1992), which discusses the weight given to statements of the committeeman in charge of a bill during legislative debate:

> When a bill is reported out of a standing committee, the member in charge of the bill, normally the chairman, explains its meaning to the house. He also answers questions concerning the meaning of particular sections or phrases. The committeeman in charge has the duty of defending the bill, has familiarized himself with the situation sought to be remedied by the bill and his statements may be taken as the opinion of the committee about the meaning of the bill
>
> . . . .
>
> His remarks upon presenting the bill to the house and his answers to questions asked by members will be considered by the courts in construing provisions of the bill subsequently enacted into law. These statements are regarded as being like supple-mental committee reports and are accorded the same weight as formal committee reports."

See also Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-475 (1921) (explanatory supplemental statements made by a member of Congress in charge of a bill in its course of passage may be resorted to in construing an Act of Congress).

following exchange took place between Senator Thomas of Colorado and Senator Pittman:

> Mr. THOMAS. Mr. President, section 6 of the proposed bill provides for the reservation from the operating clause of the patent of "all the coal and other valuable minerals in the lands so entered and patented." I wish to inquire of the Senator from Nevada whether that reservation is broad enough, or is intended to be broad enough, to include veins of gold, silver, lead, and other metalliferous deposits?
>
> Mr. PITTMAN. In line 25, at the bottom of page 3, in section 6, the bill says:
>
> The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.
>
> Mr. THOMAS. If it does include that class of deposits, I can foresee a great deal of complication and trouble arising from the attempt to prospect for valuable mineral deposits on these lands under the mining act of 1872, which is confined to lands upon the public domain, and which requires certain preliminary steps to be taken before the right to locate can be exercised. I believe it would be very much better for the Government, for the prospector, and for the operator under the provisions of this bill, if there were no such exception; and I shall therefore offer an amendment to eliminate section 6 from the bill.
>
> Mr. PITTMAN. Mr. President, before the Senator does that, I trust that he will consider the matter for a minute. This bill, as it was originally prepared by

me, did not contain that reservation. When a similar bill was introduced in the House of Representatives, at my request, it met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands. There was not the slightest chance on earth of passing such a bill through the House of Representatives if there was the slightest suspicion that the bill could be used for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands. This reservation from all characters of agricultural entries is usual; and, without discussing the question of whether or not it is a good provision, I must say that it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry.[8]

> In my opinion, if the Senator should carry such an amendment as that he would destroy the bill. It would be subject to a suspicion which I had not in mind at the time I originally introduced the bill, but which might very well be entertained. I certainly ask him to allow the bill to remain in the form which it has been approved by the Public Lands Committees of both bodies and by the Department of the Interior.

53 Cong. Rec. S707 (1916) (emphasis added). The debate continued with Mr. Thomas' reply.

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[8] We observe that in his Apr. 15, 1993, letter Williams states that the sand and gravel on his patented lands was not exposed, and that it was necessary to remove overburden before mining the sand and gravel deposit.

> Mr. THOMAS. Will the Senator please tell me how a citizen of the United States can exercise his right of acquiring a vein of gold, silver, lead, or other metalliferous deposit upon or within a 640-acre tract that is designed to reward the finder of water in the area which is included in his permit?
>
> Mr. PITTMAN. I may answer, if the Senator will permit me, by saying that if a patent were granted for agricultural purposes, including the minerals, the prospector would be in exactly the same position with regard to that particular piece of land. Undoubtedly, if the minerals under the land are not exposed they are not subject to location either by the man who owns the surface right under this bill or by outside prospectors. In neither case are the minerals subject to location under the mining law; but the Government by this bill reserves those minerals. It segregates them from the lands primarily granted for agricultural purposes . . . .

Id. (emphasis added). The Honorable Senator spoke further.

> Mr. THOMAS. I am aware, of course, of the effect of the measure in that it provides that the Government shall retain title to virtually everything except the surface of the ground and such rights as are inseparable from its use for agricultural purposes. It appears to me, however, that the practical operation of this section would be, and I think it ought to be, to confer upon the successful prospector for water the metalliferous deposits, if any, which may be within his ground. At the same time, if not excluded, it may prove a fruitful source of litigation. I think the bill would be a great deal better if these reservations did not appear, and if, as to land classified as agricultural land –because I

presume that is the only land upon which these permits would be issued –the bill should provide for acquisition of complete title to 640 acres as a reward for developing its subterranean water courses.

Mr. PITTMAN. Mr. President, I believe that a person who goes to the expense of prospecting for artesian water in the State of Nevada is entitled as a matter of right to everything which is contained in his land. I would favor that if I thought it would pass the bill; but I am confident that the inclusion of any such right in this grant would mean the destruction of the bill.

. . . [I]f these minerals are disclosed on the surface of the ground, the ground is not subject to this bill. If they are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the Government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of coal or other valuable minerals that are apparently concealed under the surface, but are known to the entryman.

As I have said before, I think the entryman should have whatever is in his land; but I assure . . . Senator [Thomas], from having studied this question, from the experience I have had in the House with this bill, from the expressions by the leaders of both sides of the House of Representatives, that I believe if the Senator's amendment carries the bill will die; and I certainly would rather have what I can get for the people of our State than to stand here on a technical question

trying to get more, with the probability of losing all.
Id.

Senator Thomas's amendment to strike section 6 of S.2519 was considered and rejected by the Senate. The Senate agreed to amend section 5 of the bill by striking a provision which would have distributed a percentage of certain monies from the sale of Pittman Act lands to the State of Nevada. As amended, S.2519 was passed by the Senate. 53 Cong. Rec. S712 (1916).

Senate Bill 2519 was sent to the House of Representatives, where it was referred to the Committee on Irrigation of Arid Lands. The Committee reported S.2519, recommending passage by the House and including a May 18, 1916, letter to Committee Chairman W.R. Smith, from Interior Secretary Franklin K. Lane which stated, in part: "As finally passed by the Senate some changes were made in . . . [S.2519], notably as to the disposition of receipts and reservations of minerals in all patents issued. These amendments are, in my opinion, an improvement upon the original measure, and I have no objection to interpose thereto." H. Rep. No. 64-731, at 2 (1916). The bill died without consideration upon the adjournment of Congress. Senator Pittman introduced S.27, which was identical to S.2519, in the 65th Congress, and it also died without consideration upon the adjournment of Congress.[9]

In the 66th Congress Senator Pittman again introduced a bill for the reclamation of arid lands in the State of Nevada. The bill, designated as S.9, was reported with amendments by the Committee of Public Lands and considered by the

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[9] S. Rep. No. 65-170, at 1 (1917).

Senate on July 8, 1919.[10] The mineral reservation provision in S.9 was renumbered section 8 but otherwise was identical to the provision enumerated as section 6 in S.2519.[11] Senate Bill 9 was passed by the Senate with no further debate on the section providing for a mineral reservation and referred to the House for consideration.[12]

The House Committee on Irrigation of Arid Lands reported S.9 without amendment on September 4, 1919. The Committee Report reads in pertinent part:

> Section 8 of the bill contains the same reservations of minerals, with the facility for prospecting for and developing and mining such minerals as was provided in the 640-acre grazing homestead act which was passed by Congress.[13]
>
> The bill only applies to unreserved, unappropriated, non-mineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply. In other words, it applies to land that there is no substantial hope of improving and cultivating in any other way.

H. Rep. No. 66-286, at 1 (1919). The House considered S.9 on October 6, 1919. Representative Kinkaid of Nebraska

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[10] S. Rep. No. 66-66 (1919).

[11] 58 Cong. Rec. S2268 (1919).

[12] Id.; see also 58 Cong. Rec. H2333 (1919).

[13] This is a reference to the Stock Raising Homestead Act of Dec. 29, 1916, 39 Stat. 862, 43 U.S.C. § § 291-301 (1970).

presented the bill for the Committee, with the assistance of Representative Evans of Nevada. Three times during the debate questions were raised regarding the mineral reservation provisions. In the first instance, Representative Blanton offered an amendment "to reserve the mineral rights of the Government[.]" Mr. Kinkaid replied: "They are reserved." The following colloquy then ensued:

> Mr. EVANS of Nevada. They are already reserved.
>
> Mr. BLANTON. The way I caught the bill it just spoke of the lands as nonmineral lands. Many lands classified as nonmineral and nonagricultural lands are, as a matter of fact, mineral and agricultural in some instances.
>
> Mr. TAYLOR of Colorado. Those reservations are made now by general law. It is not necessary to put that in. You cannot get oil land by homesteading nowadays.
>
> Mr. BLANTON. Is it all reserved?
>
> Mr. TAYLOR of Colorado. Yes.
>
> Mr. BLANTON. These lands come under the general reservation?
>
> Mr. TAYLOR. Yes.
>
> Mr. BLANTON. These homesteads to-day do not contain any oil?
>
> Mr. TAYLOR of Colorado. When you get a homestead, you do not get any oil under it. The oil that may be underneath it is reserved.
>
> Mr. BLANTON. This is not with respect to any homestead rights. It carries with it the right to exploitation with regard to the reclaiming of arid lands.

> Mr. TAYLOR of Colorado. Yes; by expending a lot of money and digging an artesian well.
>
> Mr. BLANTON. If the mineral rights are properly reserved, I have no objection.
>
> Mr. EVANS of Nevada. They are properly reserved.

58 Cong. Rec. H6469 (1919). Later in the debate, Representative Gard of Ohio, concerned that there might be something "concealed in the bill by which the Government might be defrauded out of valuable land, [or there might be] obscure and ambiguous language by which the Secretary of the Interior may not at all times have the proper jurisdiction or control of the allotment of the land," offered an amendment intended to vest the Secretary of the Interior with ". . . continuing authority . . . until the final allotment is made" to the permittee. 58 Cong. Rec. H6470 (1919). Representative Gard's amendment was opposed as unnecessary and an attempt to "send [the] bill back to conference." 58 Cong. Rec. H6471 (1919). A vote was taken and Representative Gard's amendment was rejected.

Still later, Representative Jones of Pennsylvania asked whether the term "valuable mineral deposits" would include oil and gas. Mr. Kinkaid replied in the affirmative that "certainly, those are all minerals." *Id.* Senate Bill 9 was passed by the House. 58 Cong. Rec. H6472 (1919). On October 9, 1919, the Speaker of the House and the President of the Senate signed enrolled bill S.9, which was then forwarded to the President for signature. Senate Bill 9 was approved by the President on October 22, 1919.

The Congressional policy reflected in the legislative history of the Pittman Act is one of concurrent development of surface and subsurface resources.[14] Congress enacted the Pittman Act to encourage the reclamation of arid lands in Nevada, to allow the use of the surface estate for agricultural purposes, and to encourage settlement and increase the State's population and tax base.

The legislative history of the Pittman Act gives us no reason to infer that when Congress included a provision in that Act reserving valuable mineral to the Federal Government, Congress intended to have sand and gravel pass to the patentee as a part of the surface estate.[15] The conclusion that sand and gravel is reserved to the United States by the reservation found in Pittman Act patents is consistent with the Congressional purpose of encouraging the concurrent development of the surface and subsurface estates and is in accord with "the established rule that land grants are construed favorably to the Government, that

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[14] This same Congressional policy was reflected in the mineral reservation provisions of the SRHA. *See Watt v. Western Nuclear, Inc.*, *supra*, at 52.

[15] See generally *United States v. Union Oil Company of California*, 549 F.2d 1271, 1279 (9th Cir. 1977), *cert. denied sub nom. Ottoboni v. United States*, 434 U.S. 930 (1977). A review of the legislative history of the SRHA led the court to conclude that the mineral reservation in that Act "is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest." Thus, the court found that patents issued pursuant to the SRHA reserved to the United States geothermal resources underlying the patented lands – resources not likely contemplated when the SRHA was enacted in 1916.

nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt v. Western Nuclear, Inc.*, *supra*, at 59, quoting *United States v. Union Pacific Railway Co.*, 353 U.S. 112, 116 (1957). *See also Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978); *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919); *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526, 534 (1903).

We previously noted that mineral material cannot be removed from lands administered by BLM without prior authorization in the form of a mineral material sales agreement or permit issued under the Materials Act of July 31, 1947, 30 U.S.C. §§ 601, 602 (1994) and Departmental regulations. Unauthorized removal of mineral materials from public lands is an act of trespass, and trespassers are liable for damages to the United States. 43 C.F.R. §§ 3603.1 and 9239.0-7; *Richard C. Neilson*, 129 IBLA 316, 324 (1994); *Richard Connie Neilson v. BLM*, 125 IBLA at 363. Having determined that the United States owns the sand and gravel, we find that Williams' removal of the sand and gravel without authorization from BLM constitutes an unintentional trespass, and Williams is liable for damages to the United States. Therefore, BLM must determine damages under 43 C.F.R. § 9239.0-8. See also 43 C.F.R. § 9239.1-3 and *CM Concepts of Nevada*, 126 IBLA 134, 139 (1993).[16]

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[16] We wish to reiterate that this is a case of first impression. The Bureau may wish to consider the policy it adopted following the Court's finding in *Watt v. Western Nuclear, Inc.*, *supra*. As noted in *Curtis Sand & Gravel Co.*, *supra*, at 147 n. 2, trespass damages were deemed actionable from and after July 21, 1983, 45 days after the June 6, 1983, Supreme Court decision in *Watt v. Western Nuclear,*

(continued...)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

(...continued)

Inc. that "sand and gravel" was reserved mineral under an SRHA patent. With limited exceptions, trespass damages prior to July 21, 1983, were waived by BLM as an "exercise of prosecutorial discretion."

APPENDIX D

Pittman Underground Water Act of 1919

41 Stat. 293-95

Repealed, 78 Stat. 389 (1964)

CHAP. 77 – An Act To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to grant to any citizen of the United States, or to any association of such citizens, a permit, which shall give exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding two thousand five hundred and sixty acres of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply: *Provided, however,* That not more than one such permit shall be issued to the same citizen or the same association of citizens within an area of forty miles square: *And provided further*, That said land shall not be fenced or otherwise exclusively used by the permittee except as herein provided: *And provided further*, That said land shall theretofore have been designated by the Secretary of the Interior as subject to disposal under the provisions of this act.

Sec. 2. That the Secretary of the Interior is hereby authorized on application or otherwise, to designate the lands subject to disposal under the provisions of this act: *Provided, however,* That where any person or association qualified to receive a permit under the provisions of this act shall make application for such permit upon land which has

not been designated as subject to disposal under the provisions of this act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior, whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

Sec. 3. That any qualified applicant for a permit under section 1 of this Act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this Act, and shall pay to said register and receiver a filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this Act.

Sec. 4. That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in the quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting said operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this Act.

Sec. 5. That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit the said permittee shall be entitled to a patent for one-fourth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land.

Sec. 6. That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead Act.

Sec. 7. That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the Reclamation Act.

Sec. 8. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all time to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing

provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office; *Provided,* That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the surface of the land.

Sec. 9. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act.

Approved, October 22, 1919.

APPENDIX E

Stock-Raising Homestead Act of 1916, 39 Stat. 862,

Repealed, 90 Stat. 2744 (1976)

Sec. 9. Reservation of coal and mineral rights

All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation of the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in

lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided,* That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this subchapter with reference to the disposition, occupancy, and use of the land as permitted to an entryman under the subchapter.

APPENDIX F

Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611

Sec. 611. Common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this subchapter and sections 601 and 603 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

Supreme Court, U.S.
FILED
JUL 30 2003
OFFICE OF THE CLERK

No. 02-1593

In the Supreme Court of the United States

BEDROC LIMITED, LLC, AND WESTERN ELITE, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the reservation to the United States of all "coal and other valuable minerals" in patents issued pursuant to the Pittman Underground Water Act, ch. 77, 41 Stat. 293, repealed by Act of Aug. 11, 1964, Pub. L. No. 88-417, 78 Stat. 389, encompasses commercially valuable sand and gravel.

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In the Supreme Court of the United States

No. 02-1593

BEDROC LIMITED, LLC, AND WESTERN ELITE, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 314 F.3d 1080. The order of the district court (Pet. App. 22a-38a) is reported at 50 F. Supp. 2d 1001. The decision of the Interior Board of Land Appeals (Pet. App. 39a-63a) is reported at 140 I.B.L.A. 295.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 30, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arose when the owner of lands patented under the Pittman Underground Water Act (Pittman Act or Act), ch. 77, 41 Stat. 293 (Pet. App. 64a-68a), repealed by Act of Aug. 11, 1964, Pub. L. No. 88-417, 78 Stat. 389, extracted and sold commercially valuable sand and gravel from the lands without a federal mineral materials contract. The Pittman Act authorized the issuance of patents to certain desert lands in Nevada to individuals who successfully developed underground water resources sufficient to support agricultural use of the lands. The Act provided that the patents would reserve to the United States "all the coal and other valuable minerals" in the patented lands, "together with the right to prospect for, mine, and remove the same." Pittman Act § 8, 41 Stat. 295; Pet. App. 67a. The question presented is whether the statutorily mandated reservations include commercially valuable sand and gravel.

1. The Pittman Act was enacted in 1919 to "encourage the reclamation of certain arid lands in the State of Nevada." Pittman Act § 1, 41 Stat. 293; Pet. App. 64a. The Act authorized the Secretary of the Interior to issue permits for tracts of open, nonmineral public lands in Nevada that were not known to be irrigable and did not exceed 2560 acres each. *Ibid.* Each permit provided the permittee with the exclusive right to drill for subsurface water within his or her tract. *Ibid.* If, within two years of receiving the permit, the permittee was able to demonstrate the discovery and development of sufficient water resources to raise crops on at least 20 acres within his or her tract, the permittee became eligible to receive a patent to one-quarter of the tract. Pittman Act § 5, 41 Stat. 294; Pet. App. 66a. The

remaining three-quarters of the tract would thereafter be opened for settlement by others on 160-acre tracts under the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392. Pittman Act § 6, 41 Stat. 294-295; Pet. App. 66a.

The primary purpose of the Pittman Act, sponsored by Nevada Senator Key Pittman, was "to encourage the discovery of artesian water on the public domain in the State of Nevada without appropriation or expense on the part of the Government," in order to promote "[t]he future development of the agricultural land of the State." S. Rep. No. 4, 64th Cong., 1st Sess. 1-2 (1915). Although the legislation as originally proposed did not contain a reservation of minerals (see 53 Cong. Rec. 707 (1916) (Sen. Pittman)), the version that was enacted contained the following provision:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same.

Pittman Act § 8, 41 Stat. 295; Pet. App. 67a. Commenting on the addition of the minerals reservation to the legislation, Senator Pittman explained that "it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry. * * * [T]he inclusion of any such right in this grant would mean the destruction of the bill." 53 Cong. Rec. at 707.

2. Petitioners BedRoc Limited, LLC (BedRoc), and Western Elite, Inc., are the current owners of property patented to Newton and Mabel Butler under the Pittman Act. Pet. App. 4a-5a. On April 1, 1993, the

Bureau of Land Management (BLM) notified Earl Williams, petitioners' predecessor in interest to the property, that the extraction and removal of sand and gravel from the property without proper authorization from the United States government constituted a violation of federal law. *Id.* at 5a. BLM then issued a decision finding Mr. Williams liable in trespass and ordering him to cease and desist from continued extraction and removal of mineral materials. *Ibid.* Mr. Williams appealed the trespass order to the Interior Board of Land Appeals (IBLA) on the ground that sand and gravel were not "valuable minerals" within the scope of the Pittman Act reservation.

In 1995, while the appeal to the IBLA was pending, petitioner BedRoc acquired the land. It entered into a stipulation with BLM under which it could continue the sand and gravel mining operation, on condition that it would place money in escrow from the sale of each cubic yard of sand and gravel removed, pending a final adjudication of title to the minerals. Pet. App. 5a. In 1997, the IBLA, finding that the mineral estate reserved in Pittman Act patents encompasses sand and gravel, affirmed BLM's trespass decision. 140 I.B.L.A. at 304-313.

3. In July 1998, petitioner BedRoc and Williams filed a complaint in the United States District Court for the District of Nevada seeking an order quieting title to the sand and gravel. The United States counterclaimed and sought trespass damages. On cross-motions for summary judgment, the district court ruled that sand and gravel are encompassed within the minerals reservations mandated by the Pittman Act. Pet. App. 22a-38a.*

4. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. Pet. App. 1a-21a. The court of appeals first concluded that consideration of the statutory text alone did not resolve whether the phrase "valuable minerals" in Section 8 of the Pittman Act encompasses sand and gravel. *Id.* at 6a-8a. However, after supplementing its textual review with consideration of the purposes of the Act, the legislative history, and the contemporary understanding of what constituted "valuable minerals," the court of appeals concluded that the minerals reservation in Section 8 includes sand and gravel. *Id.* at 9a-21a.

ARGUMENT

The decision of the court of appeals is correct, it is consistent with this Court's precedents, and it does not conflict with the decision of any other court of appeals. Contrary to petitioners' arguments, this case does not present a question about the proper interpretation of *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983), or an appropriate opportunity for reconsideration of its holding. Furthermore, as petitioners acknowledge (Pet. 2), the Pittman Act, which was repealed almost 40 years ago, resulted in the disposition of only a very small amount of public land, all situated within the State of Nevada. Accordingly, this Court's review is not warranted.

1. Petitioners err in contending (Pet. 4-17) that the court of appeals' decision is based on an "over-broad

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* In 1996, BedRoc had transferred 40 acres of the land to petitioner Western Elite. In light of that transfer, the parties agreed to amend the complaint to add Western Elite as a plaintiff in the action commenced by BedRoc and Williams. Pet. App. 2a n.2.

construction" (Pet. 4) of *Western Nuclear* and that this Court's review is warranted to clarify the holding in that case. Contrary to petitioners' contention, the court of appeals did not conclude that this case was controlled by *Western Nuclear*. Indeed, the court expressly stated that it could *not* simply conclude that the reservations in the Pittman Act, which are at issue here, and those in the Stock-Raising Homestead Act (SRHA), 43 U.S.C. 291 *et seq.*, which were at issue in *Western Nuclear*, are "coextensive," because the two statutes contain somewhat different language. Pet. App. 16a. The court of appeals relied on *Western Nuclear* for the unremarkable principle that ambiguous patent reservations mandated by a federal statute should be construed in light of the purposes and policies underlying the statute. See *id.* at 11a-12a (quoting *Western Nuclear*, 462 U.S. at 52, 56). The court of appeals' reliance on *Western Nuclear* was entirely appropriate, and the decision below is fully consistent with this Court's decision in that case.

a. In *Western Nuclear*, this Court construed the scope of minerals reservations required by the SRHA, which authorized the issuance of land patents subject to reservation of "the coal and other minerals" in the lands. 462 U.S. at 37 (quoting 43 U.S.C. 299). The Court concluded that the reservation of "minerals" encompassed gravel because a contrary conclusion would "produce a result at odds with the purposes underlying the statute." *Id.* at 56. The Court reasoned that Congress wanted to "facilitat[e] the concurrent development of surface and subsurface resources." *Ibid.* Congress also "plainly expected that the surface of SRHA lands would be used for stock-raising and raising crops." *Id.* at 53. Placing control over exploitation of gravel and other commercially valuable subsurface

resources in the hands of the homesteaders who owned the surface estate would not be likely to promote development of the subsurface resources, because the homesteaders would have experience and interest in stock-raising and farming rather than mineral extraction. *Id.* at 55-56. The Court therefore interpreted the minerals reservation in the SRHA "to include substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." *Id.* at 53. Under that interpretation, the Court concluded, there was no doubt that the minerals reservation includes gravel. *Id.* at 55.

The Court also found it "highly pertinent" that federal administrative and judicial decisions had consistently "recognized that gravel deposits could be located under the general mining laws" (462 U.S. at 57), and the Court observed that "treatment of gravel as a mineral under the general mining laws suggests that gravel should be similarly treated under the SRHA" (*id.* at 59). Significantly, in construing the scope of the minerals reservation at issue in *Western Nuclear*, the Court did not inquire whether the specific gravel deposit at issue had commercial value at the time that the patent containing the reservation was issued. Instead, the Court determined that gravel of commercial value was considered a mineral when the SRHA was passed in 1916, and that commercially valuable deposits of gravel therefore were reserved from all SRHA patents as a matter of law. See *id.* at 60 (holding that "gravel is a mineral reserved to the United States in lands patented under the SRHA").

b. Applying an analysis that paralleled this Court's approach in *Western Nuclear*, the court of appeals here

concluded that, in light of the text, purposes, and history of the Pittman Act, as well as the contemporary understanding when the Act was passed, patents issued under the Pittman Act reserved commercially valuable sand and gravel. The court of appeals correctly understood *Western Nuclear* to establish that the minerals reservation in the SRHA "is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources for separate disposition and development." Pet. App. 12a. Examining the similar legislative purposes of the Pittman Act, the court of appeals concluded that the minerals reservation in that Act should be construed in a similar manner. *Ibid.*

The court of appeals further noted that the congressional debate leading to enactment of the Pittman Act addressed the scope of the minerals reservation and confirmed that Congress understood the reservation to be broad in scope. Pet. App. 12a-16a. As the court of appeals explained, Senator Pittman, the Act's sponsor, described Congress's aim "to separate the mineral estate entirely—'any character of minerals'—and reserve it to the government." *Id.* at 14a (quoting 53 Cong. Rec. at 707). The court of appeals therefore concluded that "Congress did not intend to convey any mineral rights to patentees under the Act." *Id.* at 16a.

The court of appeals correctly rejected petitioners' theory (see Pet. 11, 13-17) that the presence of a "valuable mineral" cannot be determined without a site-specific analysis applying the "prudent man test" of the General Mining Act of 1872 (Mining Act) to determine whether a "mineral deposit" had sufficient value to warrant a land claim under the Mining Act at the time of the patent. See Pet. App. 17a-21a. The court explained that the term "valuable minerals," which appears in the

Pittman Act, is distinct from and broader than the term "valuable mineral deposits," which is used in the Mining Act. *Id.* at 18a-19a. The Pittman Act requires the reservation of all "valuable minerals" even if the particular "deposit" on the patented land was not valuable at the time the patent was issued. And the term "valuable minerals," the court reasoned, includes all minerals that, in sufficiently valuable deposits, could have justified a claim under the Mining Act at that time. *Id.* at 19a-20a. The court of appeals therefore relied (*id.* at 17a) on official government reports establishing that, at the time of the Pittman Act's passage, there was a substantial market for sand and gravel, which were locatable under the Mining Act, and held that Congress intended to reserve those substances when it reserved the mineral estate to the United States. The court's reasoning and conclusion are entirely consistent with *Western Nuclear*.

2. Petitioners also err in contending (Pet. 18-27) that this Court should grant review to reconsider its holding in *Western Nuclear*. As an initial matter, this case does not present an opportunity to reconsider *Western Nuclear* because this case involves interpretation of a different (and geographically much more limited) statute. *Western Nuclear* addressed the scope of the minerals reservation in the SRHA, while this case concerns the scope of the reservation in the Pittman Act. As the court of appeals explained, the two reservations are phrased in different language and cannot be assumed to be coextensive. Pet. App. 16a. The court of appeals therefore based its decision in this case on a detailed analysis of the text, purposes, and legislative history of the Pittman Act, which was not at issue in *Western Nuclear*. See *id.* at 6a-21a. This case is there-

fore not an appropriate vehicle for reconsideration of the Court's decision in that case.

In any event, petitioners have not made the extraordinary showing necessary to warrant disregarding *stare decisis*—which should have special force where questions concerning interests in real property are at issue, cf. *Arizona* v. *California*, 460 U.S. 605, 620 (1983)—and overruling *Western Nuclear*. Petitioners first argue (Pet. 18-21) that *Western Nuclear*'s definition of "mineral" departs from the prevailing judicial view of the scope of minerals reservations in private land transactions and has created a distinct, more limited surface estate for land grants from the federal government under statutes mandating that minerals be reserved to the United States. Whether or not petitioners are correct in those assertions, the scope of a statutorily mandated minerals reservation turns on what Congress intended when it enacted the applicable statute, not on what courts have concluded that private parties may have intended in particular transactions in other settings. In *Western Nuclear*, this Court carefully reviewed and correctly ascertained Congress's intent in enacting the reservation in the SRHA, and, in this case, the court of appeals likewise carefully reviewed and correctly ascertained Congress's intent in enacting the reservation in the Pittman Act. Furthermore, petitioners' argument ignores "the established rule that land grants are construed favorably to the Government, and that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Western Nuclear*, 462 U.S. at 59 (citing cases). Accordingly, any difference between the scope of the minerals reservations in the SRHA and the Pittman Act and the scope of minerals reservations created by private transac-

tions does not warrant revisiting this Court's carefully considered holding in *Western Nuclear*.

Petitioners also err in contending (Pet. 21-24) that *Western Nuclear* and the decision below disregard administrative decisions from the early twentieth century rejecting claims that lands containing substantial gravel deposits should be classified as "mineral lands." See, *e.g.*, *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310 (1910), overruled by *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714 (1929). As this Court explained in *Western Nuclear* when rejecting that very argument, it is unlikely that Congress was aware of those administrative decisions, which were, as a contemporary treatise had pointed out, 2 Curtis Lindley, *American Law Relating to Mining and Mineral Lands* § 424, at 996 & n.78 (3d ed. 1914), "inconsistent with the [Interior] Department's traditional treatment of the problem." 462 U.S. at 46 n.7. Moreover, the question at issue in the administrative decisions was distinct from the question at issue here and in *Western Nuclear*. Those decisions concerned whether land chiefly valuable for sand and gravel mining was "mineral land" and therefore could not properly have been conveyed under the homestead laws. *Id.* at 45. They did not concern the scope of a statutorily mandated minerals reservation in a land grant from the government.

Petitioners also fail to take into account contemporaneous decisions of this Court construing reservations in land grants, including *Northern Pacific Railroad* v. *Soderberg*, 188 U.S. 526 (1903). In that case, this Court "quoted with approval a statement in an English case that 'everything except the mere surface, which is used for agricultural purposes; anything beyond that which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is

gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land.'" *Western Nuclear*, 462 U.S. at 44 (quoting *Soderberg*, 188 U.S. at 536). It is more likely that Congress, in enacting the minerals reservations at issue in *Western Nuclear* and this case, understood the law to conform to this Court's decision in *Soderberg* than it is that Congress believed the law to conform to the administrative decisions cited by petitioners. *Id.* at 46. Accordingly, those decisions provide no reason for this Court to reconsider *Western Nuclear*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2003

Supreme Court, U.S.
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OFFICE OF THE CLERK

(3)

No. 02-1593

IN THE

SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; UNITED STATES BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, THE NORTHWEST MINING ASSOCIATION, AND GRANITE CONSTRUCTION INCORPORATED IN SUPPORT OF PETITIONERS

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22 pp

QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals." Citing *Watt v. Western Nuclear*, 462 U.S. 36 (1983), the Ninth Circuit ruled that the Pittman Act reserved *all* sand and gravel as "valuable minerals," regardless of whether the materials at any given property had economic value at the time the land was patented.

The questions presented are:

(1) Whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were "valuable minerals" at the time of the patent; and

(2) If *Watt v. Western Nuclear* calls for the application of a *per se* rule regarding the reservation (or non-reservation) of common materials, whether congressional intent would be better served by a rule that common materials are *not* reserved to the government as "valuable minerals."

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INTEREST OF AMICI CURIAE[1]

The Associated General Contractors of America ("AGCA") is the largest and oldest of the national trade associations in the construction industry. It is a non-profit corporation formed in 1918 at the request of President Woodrow Wilson. AGCA now represents more than 33,000 firms in more than 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 14,000 material suppliers and service providers to the construction industry. AGCA has two chapters and approximately 700 members in Nevada, the state in which this case arose.

AGCA's members engage in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and the install utilities necessary for housing development. Their projects require vast quantities of sand and gravel and they therefore have a great and continuing interest in the cost and availability of these materials. A significant number of AGCA members also mine sand and gravel on western and other lands. In some instances, they are simply self-supplying the materials they need for their

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certifies that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

projects. In other cases, they also supply sand and gravel to other construction contractors.

AGCA seeks to ensure that construction contractors can efficiently support the physical infrastructure on which all Americans are heavily dependent for their quality of life. To that end, the association's bylaws require it "to promote fair and honorable dealings with the owners of construction projects ... and with all segments of the construction industry, including architects, engineers, specialty and subcontractors, and suppliers of materials and services." AGCA is committed to skill, integrity and responsibility.

AGCA's members have found that the cost of transporting sand and gravel is extremely high. Whether a construction project is cost effective often therefore depends on whether construction contractors can produce or purchase these materials relatively near the project. Where neither sand nor gravel, nor other aggregate, is available at reasonable prices, less infrastructure is likely to be built. Because Nevada is one of the fastest growing states in the United States from the standpoint of population growth and construction activity, AGCA members have a strong interest in the availability of sand and gravel resources in Nevada as well as in other western States.

As an *amicus curiae*, AGCA regularly participates in nationally significant cases in both state and federal courts, including the Supreme Court. As an *amicus curiae*, AGCA last appeared before this Court in *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

The Associated General Contractors of California ("AGCC") is the AGCA chapter for most of the state of California. AGCC is an independent but affiliated trade association of responsible construction contractors and

related firms, including sand and gravel producers. It is equally committed to skill, integrity and responsibility in the improvement of our physical environment. Founded in 1920, AGCC proudly represents more than 1,100 firms, including general contractors, specialty contractors, material suppliers, and other businesses servicing the construction industry in California. AGCC is the voice of California's construction industry, and is committed to improving the performance of its members and the construction industry as a whole. AGCC members operate not only in California, but also nearby western states such as Nevada.

Northwest Mining Association ("NWMA") is a 107-year-old, 2,000 member non-profit, non-partisan trade association founded in Spokane, Washington during the early years of the Coeur d'Alene Mining District. NWMA was soon supporting the mining industry throughout the states of Alaska, Idaho, Montana, Oregon, and Washington, the provinces of Alberta and British Columbia, and the Yukon and Northwest Territories. NWMA's members rely on an abundant and economical source of sand and gravel for road building and other construction activities which are ancillary to mining operations.

Today, NWMA is a regional association representing members' interests throughout the United States and Canada, and facilitating their global interests. NWMA serves in the role of the state mining association for Oregon and Washington, working closely with sister organizations representing the aggregate industry. It also works closely with the National Mining Association and state mining associations in the western United States, as well as provincial and regional mining associations throughout Canada.

NWMA is recognized throughout the world as an innovative and proactive leader in addressing the needs of an increasingly global mining industry. Today, its members reside in 40 U.S. states, 9 Canadian provinces or Territories, and 15 other countries.

NWMA's purpose is to represent and inform members on legislative, regulatory and technical issues, to support and advance the mineral resource and related industries, to provide for the dissemination of educational materials related to mining, and to foster and promote economic opportunity and environmentally responsible mining.

Incorporated in 1922, Granite Construction Incorporated builds roads, tunnels, bridges, airports and other infrastructure-related projects used by millions of people – all of which require an affordable source of aggregates like sand and gravel. In addition, Granite Construction produces sand, gravel, ready-mix and asphalt concrete and other construction materials. Unusual among large contractors, Granite Construction handles both large and small jobs through its two operating divisions. The Branch Division serves local markets in the West and builds smaller, shorter duration projects. The Heavy Construction Division builds larger, more complex projects, nationwide. Granite Construction operates projects in California, Nevada, and more than fifteen other states. Granite Construction is a member of AGCA and AGCC.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling in this case is overbroad and a threat to vital sand and gravel resources and the property rights of western landowners. This Court should grant the writ of certiorari requested in this petition and reverse the court below.

ARGUMENT

I. Background of Petitioners' Case

The Pittman Act was part of Congress's decades-long effort to encourage settlement of the American West through land grants to those who would lead the way. *See* 41 Stat. 293-95 (1919). It authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands . . . in the State of Nevada." *Id.* Prospectors who discovered and successfully developed an underground water source could obtain patents for up to 640 acres of land. Such patents reserved to the United States "all the coal and other valuable minerals," which in turn would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." Pittman Act § 8, Petitioners' Appendix ("Pet. App.") at 67a.

Common sand and gravel were abundant on Pittman Act lands at the time of the patent in this case, but there was no market for such materials at that time due to the remote location. *See* Excerpts of Record ("ER") at 34-35. Location is key when it comes to determining the value of sand and gravel deposits, for low marginal profits and high transport costs make it important that supplies lie close to their market. Although sand and gravel extraction in Nevada was largely uneconomical for many years after enactment of the Pittman Act, expansion of the city of Las Vegas in the 1990s created a market for gravel in the area. *See* ER 34-35, 37.

Affordable sand and gravel supplies are essential ingredients in urban and suburban growth. Nevada is growing quickly, driven by Las Vegas development that makes it "one of the fastest growing cities in America." Patrick Barta, *Acres and Pains: Growing Scarcity Of Land Alters Home Economics*, WALL ST. J., Apr. 15, 2003 at A1. This growth makes the availability of afforable sand and gravel key to the economy of Nevada.

Petitioners are challenging the Ninth Circuit's over-broad construction of this Court's 1983 ruling in *Watt v. Western Nuclear* that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"). Using *Western Nuclear* as its vehicle, the Ninth Circuit converted the historically limited scope of statutory mineral reservations into a radical expansion of federal ownership of Pittman Act lands, at the expense of the reasonable expectations of private owners. Even when the term "valuable minerals" is afforded its broadest potential interpretation consistent with basic mineral law, common materials such as sand and gravel are regarded as "minerals" only when they have economic value *at the time of the patent*. Contrary to the decision below, *Western Nuclear* did not establish a broad *per se* rule that resolved all issues under federal statutory mineral reservations, or even gravel mineral reservations, or even all issues related to gravel reservations. *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (distinguishing *Western Nuclear* and remanding to district court to determine whether gravel was a mineral included in the reservation of an exchange patent issued under the Indian Reorganization Act of 1934). *See also, e.g.*, Jean Feriancek, *What Constitutes a Mineral?*, 15-SPG NAT. RESOURCES & ENV'T 261, 262 (2001) ("The *Western Nuclear* decision did not answer the question of gravel ownership on lands patented under statutes other than the SRHA, or as to minerals acquired by

the federal government through other means such as land exchange.").

Thus, although gravel is a vital economic resource today, because it was not valuable *at the time Petitioners' predecessors in interest received their patent*, the gravel at issue in this case should be construed as Petitioner's private property in light of the Pittman Act and conditions existing at the time of the conveyance at issue in this case. Sensitive to both the enormous impact of judgments about the scope of private versus federal mineral rights in the western United States, and the dangers of reflexive nationalization of property rules and property rights without regard to the interests at stake, this Court should grant this petition and review the Ninth Circuit's erroneous, overbroad, and dangerous interpretation of statutory mineral reservations.

II. The Ninth Circuit's Ruling Threatens Private Aggregate Extraction Operations That Remain Critical to the Health of the Nation's Economy, Federalizing Private Property Rights and Environmental and Other Controls

If left standing, the Ninth Circuit's decision will impair the sand and gravel industry in the western United States and its ability to contribute to the nation's economy. This industry serves an important role in all forms of economic activity, including the activities of and transactions with the members of AGCA, AGCC, and NWMA.

Sand and gravel are among the most common of earth's geological materials. In their natural state, sand and gravel can be loose and easily handled, composed of a range of grain sizes. Alternatively, sand and gravel are often produced by crushing common sandstone rock which is prevalent throughout the western United States. Sand and gravel are common materials for fills and as a base for

pavements, including interstate highways and local mine roads, as well as other structures. When combined with cement binders, sand and gravel become the principal ingredient in an unusually strong and long-lasting construction material – concrete – whether used in its plastic state and placed in forms, or precast as pipe, block and other structural components. When combined with asphalt, sand and gravel become the aggregate forming the major element of a widely used paving material, asphaltic concrete.

Sand and gravel are the most common materials used as aggregate. In fact, in some sections of the country – including the region served by Petitioners – these materials are the only viable source of aggregate. As natural deposit materials, sand and gravel are highly useful resources but only when they are relatively close to those locations where aggregates may be needed. Wherever communities, homes, and industrial operations have been established, sand and gravel are necessary as aggregates. The national annual consumption of aggregates including sand and gravel is more than ten tons per capita.

One essential aspect of sand and gravel operations lies in the economics of its extraction. Due to transportation costs, it is critical for the industry to utilize sand and gravel deposits near the market for these materials. Sand and gravel are bulky, heavy and relatively lost cost products. As such, these products can absorb little increase in hauling distance from extraction site to consumer without a prohibitive increase in delivered product cost. As a result, the majority of such extraction sites are close to the point of product use (usually within a metropolitan area where the demand for land and other uses is pressing and acute, like the ever-expanding areas in Nevada).

The inability of the industry to use locations which are subject to other uses – or taken outside of private ownership

– can only lead to increasing extraction and construction costs. "The fundamental problem of the industry, therefore, is that of securing the right to continue to produce sand and gravel for the construction industry at locations that are economically feasible." Nat'l Stone Sand and Gravel Association, *The Sand and Gravel Industry: A Valuable Resource – A Vital Construction Material*, available at http://www.nssga.org/whoweare/sandgravel.htm (visited July 31, 2003).

Compliance with current land use and other environmental controls – many supported by the aggregate mining, and construction industries – makes aggregate extraction an activity accepted by communities as a responsible contributor to the economy. Nevertheless, there are still difficulties in securing the right to produce sand and gravel because of local zoning ordinances, state acts, and federal controls affecting the industry's surface mining activities. The substantial capital investment required for modern sand and gravel plants is already a risky undertaking for the prospective producer without increased costs associated with federal property controls such as those created by the Ninth Circuit's ruling at issue here.

This investment will become all the more difficult (and, indeed, prohibitive in many cases) if the United States can now claim ownership to millions of acres of western deposits. Substantial past investments, reasonably made on the expectation of private ownership, will be lost; and many future investments and production activities will be entirely thwarted.

Moreover, under the Ninth Circuit's rationale, numerous aggregate operations – mostly local and regional businesses that have by long tradition operated under largely competent and responsible state and local control – will be subject also to federal authorities with strong bureaucratic interests in

extracting from them not only cash in the form of royalties from the newly-created federal ownership of sand and rock, but also compliance with a host of federal rules and regulations. Many of these will be duplicative of responsible controls already in place at the state and local level, and all of them will unnecessarily increase the costs of an activity with an already low marginal profit.

The imposition of federal ownership will require any private party seeking to gain access to federal "reserves" to deal now with the costly requirements of, and the delays associated with, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§470 *et seq.*, and many other federal controls – not to mention simply the cost of negotiating an extraction authorization from the federal government and the price the government will charge for access to its new lodes of gravel. This will require environmental assessments, species consultation, cultural resource assessments, novel royalty payments to the federal government, higher prices, and lower resource productivity for communities, businesses and homeowners, and others.

For example, in the case of Nevada, over 83 percent of the State's land base is already owned outright by the United States. *See* U.S. Dep't of Interior, PUBLIC LAND STATISTICS at Table 1-3 (2001). Now, as a result of the Ninth Circuit's ruling exaggerating this Court's prior ruling in *Watt v. Western Nuclear*, the United States will own the sand and gravel in all western lands with estates split between surface and mineral rights unless this Court intervenes.

The federal government would become the principal party in hundreds of common aggregate operations and discourage the extraction and use of these resources. This

outcome does not reflect the intent of the Pittman Act or our general public land policies which traditionally supported private ownership and dominion over lands conveyed.

III. The Ninth Circuit's Ruling is Erroneous and Offends Long-Standing and Fundamental Principles of Mining and Property Law

The Ninth Circuit misconstrued the rule acknowledged in *Western Nuclear*: Common materials can be identified as "minerals" only if they have economic value. Unless economic value exists at the time of the conveyance, common materials are not within the scope of "minerals" reserved. Land patentees should be entitled to know what has been granted at the time of the conveyance – only common materials of the requisite value at the time of the conveyance can be reserved.

Western Nuclear itself was an anomaly in public land law and a disturbance in private property rights – any continued reliance on, or expansion of its scope, should be suspect. "The *vast majority of courts* have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals." *Miller Land & Mineral*, 757 P.2d 1001, 1003 (Wyo. 1988).[2] In addition, contary to

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[2] *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954); *Miller Land & Mineral*, 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215,

(continued....)

the Ninth Circuit in the case at bar, "Most state courts have addressed the issue have concluded, like Wyoming, that ordinary sand and gravel are part of the surface estate" – thus, belonging to Petitioners in this case. Feriancek, *supra*, 15-SPG NAT. RESOURCES & ENV'T at 279.

Thus, the Ninth Circuit's decision splits from most cases that interpret mineral reservations as relates to sand and gravel. Most courts have seen *Western Nuclear* as an unusual decision, contrary to longstanding mining and property law precedents, and seen fit to limit it to its facts. In this case, the Ninth Circuit rather than recognizing the limited reach of *Western Nuclear* has breathed new life and reach into an otherwise anomalous case. This Court should

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(continued) . . .

1219 (7th Cir. 1983) (limestone not reserved where government acquired surface estate from private party). *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not mandated in the statute itself. *See United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands"); *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 681 (10th Cir. 1986) (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"); *Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties ... as used in the exchange patent at issue"). *See also* John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984); *Miller Land & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is [ ] confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . .").

recognize state property law precedent and reject the Ninth Circuit's interpretation.

It is a fundamental tenet of property law that conveyances are to be interpreted at the time of the grant n accordance with the intent of the parties. *See* HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY §6.1 (5th ed. 2001). *See also, e.g.*, *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] *if it has the requisite value*. And there may be instances wherein a reservation of minerals has been made in past years and wherein the requisite *value was present and recognized to be so* in the minds of the parties.") (concurring opinion). Any other interpretation would create shifting private property rights whose security would simply be at the whim of the current market for particular minerals.

This fundamental concept is even stronger where Congress grants land and attempts to induce investment through the creation of private property rights. The *Western Nuclear* dissenters (Justices Powell, Rehnquist, O'Connor and Stevens) reasoned that "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of that soil." 462 U.S. at 71-72. Here under the Pittman Act, Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1

(1919). To now deny rights to sand and gravel, simply as a result of changing conditions, would frustrate this intent of Congress to encourage development on Pittman Act lands.

As this Court has held, when Congress:

> offers to individuals or to corporations as an inducement to undertake and accomplish ... works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (citation omitted). The Ninth Circuit's ruling, if allowed to stand, would make citizens landowners subservient to the federal government rather than serve the purposes of the Pittman Act to encourage development in the West.

The Department of Interior itself acknowledged in the past that value should be determined at the time a patent is obtained, *not* at some later date. This interpretation should stand. When interpreting an analogous 1926 statutory mineral reservation, Interior concluded that only deposits valuable at the time of conveyance were reserved;

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

U.S. Dep't of the Interior, Solicitor Op. M-36379, at Summary (Oct. 3, 1956) (emphasis added) (cited in dissent of *Western Nuclear*, 462 U.S. at 67 n. 11 (Powell, J.,

dissenting)). The Solicitor explained that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* at 4 (emphasis added). Interior thus recognized that sand and gravel were not intrinsically valuable minerals and would only be reserved when they had economic value at the time of conveyance.

If taken to its logical conclusion, the Ninth Circuit's decision would, in fact, make almost all surface rights granted under the Pittman Act subject to federal property, permission, and control. The Ninth Circuit's rationale could leave Pittman Act and other western surface landowners "with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result." *Western Nuclear*, 462 U.S. at 61 (Powell, J., dissenting). After all, the agricultural crops on Pittman Act lands can only exist and sustain by draining minerals from the soil. These minerals are thus "valuable" because they contribute to the health of the crops. The crops naturally extract these minerals. If the Ninth Circuit's broad rationale is sustained, then these crops should also be federal property – having extracted valuable minerals from the soil. Surely, this was not the intent of Congress. Surely, this Court should limit a ruling that would lead to such a result.

A final instructive factor favoring granting the Petition comes from this Court's recent decision in *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999). As *Amoco* explains, statutory mineral reservations are not ambiguous merely because they fail to conclusively include or exclude particular substances. Their meaning should not change because of new science. Similarly,

whether a deposit is "valuable" when a statutory mineral reservation becomes effective should not later change due to a fluctuating market. The common conception at the time of conveyance is key.

The *Amoco* Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. This Court held that "the *common conception* of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource." *Id.* at 874 (emphasis added). According to the Court:

> The question is not whether, *given what scientists know today*, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."

Id. at 873 (emphasis added).

At the time the Pittman Act was passed and the patent at issue was granted, sand and gravel at the relevant site were not considered valuable minerals. The scope of property rights granted should not be allowed to change today simply because of alterations in markets and technology. Just as it was noted in *Leo Sheep*:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability

> where land titles are concerned, and we are unwilling to upset settled expectations....

Leo Sheep Co., 440 U.S. at 687 (citations omitted).

The Ninth Circuit's decision adversely affects private property rights. The Ninth Circuit's erroneous interpretation of *Western Nuclear* will govern property rights not just on those Pittman Act lands directly at issue, but on all lands patented under similar general statutory mineral reservations under at least thirteen federal statutes requiring the reservation of all minerals in certain conveyances by the United States. *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002). This Court should grant this petition not only to resolve the Pittman Act issues involved here, but also to cut off the potential precedential effect of this case at the pass before the broad ruling is used to alter the rights of landowners throughout the West.

IV. The Ninth Circuit's Interpretation Would Lead to the Waste of Resources and Leave Economic Gravel Deposits Unexcavated and Unused

Resources should be channeled to their highest and best use.[3] As a matter of policy, congressional acts should be construed to accomplish this end and with a presumption in favor of private property rights. It is possible that – by resolving ownership in favor of the federal government – this case could lead to the waste of economically important

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[3] "The basic system of property rights is fundamental not only because it is comprehensive, but also because it allows resources to reach their highest and best use with the minimum level of friction." Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 193 (1992).

natural resources. Congress intended to reserve economically important natural resources for the purpose of allowing production of them. However, to construe common sand and gravel to be within the scope of that reservation actually impedes private development of the resources. In light of this reality, the Ninth Circuit's opinion should be reversed – especially as it is at least clear that Congress did not evince any certain intent that it wanted to retain such ownership to sand and gravel deposits.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: August 1, 2003

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 02-1593

IN THE

SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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Civil Action No. CV-S-98-01012

DATE	N.R	PROCEEDING
7/13/98	1	COMPLAINT obo P (AT) mj
8/25/98	6	SUMMONS w/retn serv; D Curtis Tucker servd via cert mail on 7/17/98 (AT) sml.
	7	SUMMONS w/retn serv; D U.S.A. servd 7/20/98 via cert mail (AT) sml (to Janet Reno)
	8	SUMMONS w/retn serv; D U.S.A. servd (U.S. Atty/Reno, NV) via cert mail on 8/19/98
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10/19/98	11	ANSWER to cmplt obo Ds. (m) (AT) bh
11/9/98	12	AMENDED ANSWER & COUNTERCLAIM obo all ds (m) (AT) sml
12/1/98	13	ANSWER (entitled, "Reply") to Ds Cntrclaim #12 obo Ps/Contrdefs (p) (AT) sml
12/10/98	15	DISCOVERY PLAN/SCHEDULING ORDER (PMP) ORD Ct. stay all other pretrial proceeding until mineral reservation issue resolved. On/bef 1/30/99, ptys shall

		submt concurrent brfs on mineral reservatn issues. On/bef 3/1/99, ptys shall submt concurrent brfs respnding to 1/30/99 brfs submtd by opposing pty. W/in 30 days after entry/ord by ct (in re mineral reservatn issues), ptys shall submt new pro disc plan/sched ord, etc. (AT) Cps dist. sml
2/1/99	16	MOTION for S/J obo Ps (m) (AT) sml w/#17, #19, #20, #21 (FILED SEPARATELY)
	17	NOTICE of Filing a Fax Declaration (in re #16/Patricia Richards) obo Ps (m) (AT) sml
	18	NOTICE of Filing Unsigned Declaration (in re #16/Earl Williams) obo Ps (m) (AT) sml
	19	NOTICE of Filing Unsigned Declaration (in re #16/Floyd R. Lamb) obo Ps (m) (AT) sml
	20	BRIEF ON MINERAL OWNERSHIP obo D USA (as per Ord #15) (m) (AT) sml FILED SEPARATELY
2/3/99	21	ERRATA to Ps Mtn for S/J (#16) (nss) (AT) sml
2/8/99	22	NOTICE of Filing Orig Declarations (in re Mtn #16 & #17-#19) obo Ps (m) (AT) sml
2/10/99	23	AMENDED CERTIFICATE/MAILING of #20 on 2/1/99 obo D USA. Sml
2/11/99	24	CERTIFICATE/MAILING of #16 on 2/10/99 obo Ps (#16 was unsigned on certif./mailing) sml
3/18/99	26	BRIEF in supprt of mineral ownershiop obo D USA. OPPOSITION to Ps mtn for S/J (#16) obo D USA. (m) (AT) kly

3/18/99	27	RESPONSE to US brief on mineral ownership (#26) obo Ps. (m) (AT) kly
3/30/99	28	NOTICE OF FILING orig declaration of Jerry B. Fant re #26 obo D/USA. (m) bh
5/24/99	29	ORDER (PMP) ORD Ps Mtn for S/J (#16) DENIED. FUR ORD Ds Brf in Suppt of Mineral Ownership & Oppo (#26), reqsting a judicial declaratn finding the U.S. to be the owner of all valuable minerals underlying Bedroc's real property, incldng the sand & gravel deposits, is GRANTED, & that Jdgmt is hereby entered in favr of Def/Cntrclaimants U.S.A., Interior Sec'y Bruce Babbit, U.S. Dept. of Interior, Bureau of Land Managemnt, & Curtis L. Tucker & agnst P/CntrDefs Bedroc Ltd, LLC & Earl Williams. EOD 5/25/99 (AT) Cps dist. sml
5/25/99	30	JUDGMENT (LSW/SML) ORD Ps Mtn for S/J DENIED. Ds Brf in Suppt of Mineral Ownership & Oppo reqsting a judicial declaratn finding U.S. to be owner of all valuable minerals underlying Bedroc's real property, incldng the sand & gravel deposits, GRANTED. JDGMT hereby entered in favr of Def/Cntrclaimants U.S.A., Interior Sec'y Bruce Babbit, U.S. Dept. of Interior, BLM, & Curtis L. Tucker & agnst Ps/Ctnrdefs Bedroc Ltd., LLC & Earl Williams. EOD 5/25/99 (AT) Cps dist. sml
6/4/99	31	NOTICE OF APPEAL of Order #29/Jdgmt #30 obo Ps (m) (AT) sml
8/9/99	34	ORDER (cc) from C/A; ORD ptys jt mtn to dismiss appeal w/out prej granted. Appeal

		dismissed w/out prej to reinstatemt should USDC refuse to grant ptys mtn to w/draw its jdgmt in this matter. Ptys must file notice of reinstatemt w/in 28 days of USDC order denying their reqst for w/drawal. (AT) Cps dist. sml
9/9/99	36	JOINT MOTION to withdraw May 25, 1999 Judgment and to stay pretrial proceedings (m) (AT) pv
10/18/99	37	ORDER (PMP) ORD Jt Mtn to W/Draw Jdgmt & Stay PT Proceedings (#36) GRANTED, & Ct Order #29 VACATED & matter placed on clndr on Thurs., 12/9/99, @4:00 pm (AT) Cps dist. EOD 10/18/99. sml
12/10/99	38	MINUTES OF COURT (PMP) (Crt Recrdr: Erica Davis) of 12/9/99 stat hearing. ORD matter referred to LRL for scheduling of settlmt conf w/in next 60 days. FUR ORD ptys file Jt Stat Rept w/ct by 3/9/2000. (AT) Cps dist. sml
8/14/00	49	ORDER STIPULATION. ORD Ps shall amend cmplnt to the extent that Western Elite is added as an additional P. cpys dist.
8/21/00	50	COMPLAINT AMENDED to add Western Elite & to quiet title and for declaratory/injnctive relief obo P. (nss)
9/5/00	51	ANSWER to 1st amend cmplnt obo USA. (m)
7/25/01	71	MINUTES OF PROCEEDINGS HEARING. Ct Reporter: Erica Davis RE: Stat Hrng. (see doc for spfcs). ORD Cnsl

		shall file stip for dism by 8/15/01. cpys dist.
8/21/01	74	ORDER/STIPULATION. ORD This case is DISM. cpys dist.
10/17/01	77	NOTICE OF APPEAL re #29, 30 & 74 obo Ps. (m) Dkt fees pd #52922.
10/18/01	78	TRANSMITTAL (cpy) Orig. to C/A re Ntc of Appeal; Dkt fees pd; Design of transcrpt forms snt; cpy of dkt sheet. cpys dist.
10/30/01	80	CERTIFICATE OF RECORD C/A (cpy) Orig to C/A re Cert of Rcrd. cpys dist.
10/29/01	82	TRANSMITTAL cpy retrn fr C/A & Assigned appeal #01-17030
9/17/02	84	DESIGNATION OF RECORD OF APPEAL (cpy) Orig to C/A w/2 vols. Clks rcrds & 3 oversized folders, cc of dkt sheet. cpys dist.
1/7/03	86	OTHER OPINION frm C/A (see doc for spfcs) Dist Ct jdgmnt is AFFIRMED.
2/24/03	87	OTHER (cpy) frm C/A ORD Judgment of said District Ct is hereby AFFIRMED.
2/24/03	88	JUDGMENT (cc) frm C/A ORD Judgment of said District Ct is hereby AFFIRMED
3/4/03	90	TRANSMITTAL frm C/A re retrn of Clk's rcrds of 2 vols and 3 oversized docs.

U.S. Ninth Circuit Court of Appeals

No. 01-17080

10/23/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 10/29/01; appellee's designation of RT is due 11/6/01; appellant shall order transcript by 11/16/01; court reporter shall file transcript in DC by 12/17/01; certificate of record shall be filed by 12/24/01; appellant's opening brief is due 2/4/02; appellees' brief is due 3/4/02; appellants' reply brief is due 3/18/02 [01-17080] (gar)
10/23/01	Filed Christian B. Bryner for Appellant Western Elite, Inc., Appellant Bedroc Limited, LLC Civil Appeals Docketing Statement served on 10/17/01 (to CONFATT) [01-17080] (gar)
10/29/01	Received copy of transcript designation and ordering form filed in DC (NT) (sent to case file) (gail)
11/2/01	Filed certificate of record on appeal RT filed in DC 10/30/01 [01-17080] (gail)
11/8/01	Filed notice of appearance of L. Eric Lundgren for Aplts BedRoc Limited and Western Elite, Inc. [01-17080] (gail)
1/28/02	14 day oral extension by phone of time to file Appellant brief. [01-17080] appellants' brief due 2/19/02; appellees' brief due

	3/21/02; appellants' reply brief due 14 days fr svc of ans br. (terr)
2/21/02	Filed original and 15 copies Appellants Bedroc Limited, LLC and Western Elite, Inc.'s opening brief (Informal: no) 45 pages; 5 excerpts of record (01 Exc.vol); served on 2/19/02 (minor defcy: missing st of rel cases) Notified counsel. [01-17080] (gail)
3/8/02	Received Appellant Bedroc Limited, LLC satisfaction of (minor) brief deficiency (st of rel cases) [01-17080] (gail)
3/22/02	Filed original and 15 copies appellee USA's 41 pages brief, 01 Supp'l Exc. Vols; served on 3/21/02 [01-17080] (gail)
4/12/02	Filed original and 15 copies Bedroc Limited, LLC, Western Elite, Inc. reply brief (Informal: no) 22 pages; served on 4/8/02 [01-17080] (gail)
9/6/02	CALENDARED: San Francisco November 7, 2002 9:00 a.m. Courtroom 4 [01-17080] (mw)
11/7/02	ARGUED AND SUBMITTED TO Michael D. HAWKINS, Susan P. GRABER, Richard C. TALLMAN [01-17080] (pi)
12/30/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Michael D. HAWKINS; Susan P. GRABER, author; Richard C. TALLMAN.) FILED AND ENTERED JUDGMENT [01-17080] (hh)

2/20/03	MANDATE ISSUED [01-17080] (sm)
3/27/03	Rec'd ltr from USSC dated 3/21/03 re: application for extension of time to file petition to and including 4/30/03 for writ of certiorari [01-17080] (ld)
5/9/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1593 filed on 4/30/03 [01-17080] (sm)
10/6/03	Received notice from Supreme Court, petition for certiorari GRANTED on 9/30/03. Supreme Court No. 02-1593 (PANEL) (sm)

Note: The first eighteen documents that follow in this Joint Appendix were submitted as exhibits in:

UNITED STATES DISTRICT COURT

District of Nevada

BEDROC LIMITED, L.L.C., et al.,

Plaintiffs/
Counterdefendants,

v.

THE UNITED STATES OF AMERICA, et al., CV-S-98-01012-PMP (LRL)

Defendants/
Counterclaimants.

[Exhibit 6 to Plaintiffs' Motion for Summary Judgment
(Dist. Ct. Docket No. 16)]

DECLARATION OF EARL WILLIAMS

I, Earl Williams, do hereby swear on oath as follows:

1. My name is Earl Williams.

2. I am over the age of 18 years and make this Declaration based on my personal knowledge.

3. I have personal knowledge of the parcel property owned by Bedroc, as I was once an owner of said property.

4. I certify that the pictures of the Bedroc parcel are a fair and accurate representation of the property, sand, gravel and surface character of the property.

5. I also certify that the market for gravel and sand did not become economically viable with respect to the Bedroc parcel until the 1990s.

6. The reason there was not a market for sand and gravel for the Bedroc parcel is it is approximately 63 miles from Las Vegas, which is the primary market for the sand and gravel, and only recently did the expansion of Las Vegas create a viable market for sand and gravel.

7. I certify prior to operating our sand and gravel operation, Mr. Whisenant, a lessee, operated a sand and gravel operation for several years without interference by the BLM.

I declare, certify, verify and state under penalty of perjury that the foregoing is true and correct.

EXECUTED this 30th day of January 1999.

/s/ Earl Williams
Earl Williams

[Exhibit 3 to Plaintiffs' Motion for Summary Judgment
(Dist. Ct. Docket No. 16)]

DECLARATION OF FLOYD R. LAMB

I, Floyd [originally "Lloyd"; hand correction initialed by "FRL"] R. Lamb, do hereby swear on oath as follows:

1. My name is Floyd R. Lamb.
2. I am over the age of 18 years and make this Declaration based on my personal knowledge.
3. I have personal knowledge about the parcel of property now owned by Bedroc, L.L.C.
4. I knew the individuals who patented the subject property, Mr. and Mrs. Butler on or around 1940.
5. I knew the Butlers on a personal level, and even worked with Mr. Butler on the property.
6. Specifically, I helped Mr. Butler make cement blocks for use on the property. We built these concrete blocks in the early 1940s, possibly 1942.
7. We obtained the sand and gravel necessary to make the concrete blocks from the surface of the Butlers' property.
8. I remember that the Butlers obtained the sand and gravel from a little sand wash on the property.
9. There was absolutely no market for gravel and sand in the 1940s.
10. Sand and gravel was visibly in abundance on the Butlers' property.
11. Mr. Butler built an underground concrete pipeline using the sand and gravel from the property. The concrete pipeline was approximately one-fourth of a mile long and

was constructed to help transport water out of the ground down to hayfields.

12. In addition, Mr. Butler used the sand and gravel on the property to built a concrete floor under an awning off of the West side his house.

13. The awning and concrete floor led down to a stream Mr. Butler constructed which ran through his yard. The floor of the stream was out of concrete using sand and gravel from his property.

I declare, certify, verify and state under penalty of perjury that the foregoing is true and correct.

EXECUTED this 30 day of January, 1999.

/s/ Floyd R. Lamb

Floyd R. Lamb

[Exhibit 8 to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 16)]

[Exhibit 8 to Plaintiffs' Motion for Summary Judgment
(Dist. Ct. Docket No. 16)]

[Exhibit 8 to Plaintiffs' Motion for Summary Judgment
(Dist. Ct. Docket No. 16)]

[Exhibit 9 to Plaintiffs' Motion for Summary Judgment
(Dist. Ct. Docket No. 16)]

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON

The Honorable

The Secretary of the Interior.

Sir:

The following areas, under the provisions of the Nevada ground-water reclamation act of October 23, 1919 (41 Stat. 293), as construed by the Department, are nonmineral, nontimbered, and are not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply, and I therefore recommend their designation under the said act;

GROUND WATER RECLAMATION DESIGNATION NO. II

NEVADA

Mount Diablo Meridian

Carson City land district

****

The above described lands will be subject to disposal under the terms of the Nevada ground-water reclamation act in so far as they are unappropriated, public, and unaffected by any special provision of law, withdrawal or reservation

inconsistent with the provisions of said act.

The area included in this designation is approximately *,600 acres. The action recommended affects applications for permits listed below by serial numbers. All lands included in these applications, on approval of this order, will have been designated under the provisions of said act of October 22, 1919.

Carson City land district

***

***

Respectfully,
/s/
Director.

Approved Oct. 5, 1934
And referred to the General Land Office
To become effective immediately
/s/ T.A. Walters
First Assistant Secretary of the Interior

4 carbon copies to General Land Office

[Exhibit 1 to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 16)]

Department of the Interior

United States Land Office Carson City, Nevada
Authorized by "F" Aug. 22, 1939

Final Certificate
(Act of October 22, 1919, 41 Stat., 293)

Receipt No. 3134649 *Serial No.* 018212

August 29, 1939

It is hereby certified, that, in pursuance of the act of Congress approved October 22, 1919 (41 Stat., 293), entitled "An Act to encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes,"

Newton N. and Mabel C. Butler,

of Alamo, County of Lincoln, State of Nevada has made proof for the land described as follows, to wit:

E½, E½W½ Sec. 24, E½NE¼ Sec. 25, T.11 S., R. 62 E., M.D.M.

***

containing 560 acres.

Now, therefore, be it known, that, on presentation of this Certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said Newton N. and Mabel C. Butler shall be entitled, if all then be found regular, to receive a Patent for the land above described, subject to and containing a reservation to the United States of all the coal and other valuable minerals in the land, together with a right

to prospect for, mine, and remove same.

/s/ Gladys E. Huyck

Register.

/s NOTE.-A duplicate of this Certificate is issued to the permittee. The original is forwarded to the General Land Office, with the final proof papers, for approval by the Commissioner of the General Land Office and issuance of patent. The duplicate copy forwarded to the permittee should be held until notice of issuance of patent is received.

In all correspondence concerning the case in connection with which this Certificate issued, refer to the NAME OF THE LAND OFFICE AND THE SERIAL NUMBER noted hereon.

Posted Sept. 12, 1939 in Vol. 136, p. **, by /s/_____, Div. "O."

APPROVED Sept. 22-1939

By /s/_____, Division T

[Exhibit 4 to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 16)]

Carson City 018212

4-1040

THE UNITED STATES OF AMERICA
To all to whom these presents shall come, Greeting:

WHEREAS, A Certificate of the Register of the Land Office at Carson City, Nevada, has been deposited in the General Land Office,

whereby, it appears that, in accordance with the provisions of Section five of the Act of Congress of October 22, 1919 (41 Stat. 293-295), entitled, "An Act To encourage the reclamation of certain arid lands in the State of Nevada and for other purposes," Newton N. Butler and Mabel C. Butler are entitled to a patent for the east half and the east half of the west half of Section twenty-four and the east half of the northeast quarter of Section twenty-five in Township eleven south of Range sixty-two east of the Mount Diablo Meridian, Nevada, containing five hundred sixty acres, according to the Official Plat of the Survey of the said Land, on file in the General Land Office:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the said Act of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the said Newton N. Butler and Mabel C. Butler and to their heirs, the Tract of Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of

whatsoever nature, thereunto belonging, unto the said Newton N. Butler and Mabel C. Butler and to their heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States; reserving, also, to the United States all the coal and other valuable minerals in the lands so granted, together with the right to prospect for, mine, and remove the same upon compliance with the conditions of and subject to the limitations of Section eight of said Act.

IN TESTIMONY WHEREOF, I, Franklin D. Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the TWELFTH day of MARCH in the year of our Lord one thousand nine hundred and FORTY and of the Independence of the United States the one hundred and SIXTY-FOURTH

By the President /s/ Franklin D. Roosevelt

By /s/

/s/

Recorder of the General Land Office

RECORDED: Patent Number 1107339

[Exhibit 7 to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 16)]

9230
N57158
(NV-055.05)

APR 01 1993

(702) 726-8100

HAND DELIVERED

Earl Williams
750 Fogg
Las Vegas, NV 89110

TRESPASS NOTICE

You are hereby notified that the Bureau of Land Management has made an investigation, and evidence tends to show that you are in trespass. We allege that you are violating and/or have violated the laws specified below and that the regulations approved by the Secretary of the Interior pursuant to the authority vested in him by said laws. Therefore, it is our opinion that you:

Have committed the following acts:

1. Removal of mineral materials (sand and/or gravel) from private land where the minerals are reserved to the Federal Government under the Act of Congress of October 22, 1919 (41 Stat. 293-295), and set forth in Patent 1107339 issued on March 12, 1940. Location

of the alleged trespass is T.11S. R.62E., Section 24 E1/2, E1/2 W1/2 and T.11S., R.62E., Section 25 E1/2 NE1/4, Lincoln County, Nevada.

2. Sale of reserved mineral material (sand and/or gravel) without a valid contract or authorization of the Federal Government.

Are in violation of the following laws:

1. Revised Statute 2478; 43 U.S.C. 1201
2. Sections 302 and 310 of the Federal Land Policy and Management Act of 1976 as amended; 43 U.S.C. 1732, 1740.

And are in violation of the following regulations:

1. 43 CFR 3809.0-7 which states "The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and regulations of the Interior, except when authorized by law and regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts."

Operations, if continuing, must stop immediately.

If you have evidence or information which tends to show you are not in trespass as we have alleged, you are allowed 15 working days from receipt of this notice to present such evidence or information at the Caliente Resource Area Office of the Bureau of Land Management.

The measure of damages for mineral trespass is subject to state law. Nevada State law, however, does not prescribe the measure of trespass damages for minerals or mineral materials, such as sand, gravel, and stone. For mineral trespass in a state where state law does not govern mineral

trespass, the provisions of 43 CFR 9230.1-3 sets the measure of damages to be applied in a mineral trespass. The measure of damages for innocent trespass is the value of the material in place. The measure of damages for a willful trespass is the full value of the material at the time of sale (conversion) without a deduction for labor bestowed or expense incurred in removing and marketing the material. The cost of transporting the material from the pit to the point of sale is not considered in the trespass.

If the allegations we have made are correct, you must permanently cease and desist from the violations charged, if you have not already done so. You are allowed 15 working days from receipt of this notice to supply the Caliente Resource Area with all information required in order to effect a settlement for trespass damages. In order to effect this settlement, you must provide copies of all sales records and haul records (certified copies of mining records showing the names, addresses, and telephone numbers of buyers, quantities of materials sold, and dates of delivery) from the subject parcel of land. The amount of differentiated material (i.e., Type II, Reject Sand, Pit Run) should be identified.

Failure to comply with this notice will result in further action to protect the interests of the United States. You are further advised that the authorized officer may refuse to sell timber or mineral materials, or issue a permit, lease, or license to a trespasser who has failed to make satisfactory arrangements to satisfy his/her liability to the United States, as provided in 43 CFR 9239.

/s/ CURTIS G. TUCKER

Curtis G. Tucker
Area Manager
Caliente Resource Area

Enclosure:
1. Patent Certificate 1107339

cc: Ed Seum
NV053
Las Vegas District

Franklin F. Snyder
1516 Laburnum Street
Chesterbrook Woods
McLean, VA 22101

[Attached to Defendants' Brief on Mineral Ownership (Dist. Ct. Docket No. 20)]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
CALIENTE RESOURCE AREA
TRESPASS NOTICE

Number: N57158
State: Nevada
District: Las Vegas
Date: March 26, 1993

Earl Williams
750 Fogg
Las Vegas, NV 89110

YOU ARE HEREBY NOTIFIED That the Bureau of Land Management has made an investigation and evidence tends to show that you are in trespass. We allege that you /_/ are violating /x/ may have violated /_/ have violated the law(s) specified below and the regulation(s) approved by the Secretary of the Interior pursuant to the authority vested in him by said law. Therefore, it is our opinion that you:

Have committed the following act(s):

The removal and sale of mineral materials (sand and gravel) that are reserved to the Federal Government under the Act of Congress of October 22, 1919 (41 Stat. 293-295), and set forth in Patent 1107339 issued on March 12, 1940 without permit or authorization of the Bureau of Land Management.

Are in violation of the following law(s):

R.S. 2478; 43 USC 1201

And are in violation of the following regulation(s):

43 Code of Federal Regulations 9239.0-7:

"The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be liable for prosecution for such unlawful acts.

On the following-described land *(describe the area by legal subdivision if surveyed, or if unsurveyed, by concise reference to such natural landmarks as will clearly identify the area):*

T.11S., R.62E., section 24E1/2, E1/2W1/2
T.11S., R.62E., section 25 E1/2NE1/4
Mount Diablo Meridian, Lincoln County, Nevada

1. /X/ Violations, if continuing, *must* stop immediately 2. /_/ You are allowed days from receipt of this notice to cease the alleged trespass operation. 3. /X/ If you have evidence or information which tends to show you are not a trespasser as we have alleged, you are allowed 15 days from receipt of this notice to present such evidence or information at the Bureau of Land Management office shown on the front of this form You are allowed 15 days from receipt of this notice to appear at the Bureau of Land Management office.	shown on the front of this form to effect a settlement for trespass damages Failure to comply with this notice will result in further action to protect the interests of the United States. You are further advised that the authorized officer may refuse to issue a permit, lease, or license to a trespasser who has failed to make satisfactory arrangements to satisfy his liability to the United States, as provided in 43 CFR 4150.3e and 4170.1-1. The officer may also refuse to setll timber or materials as provided in 43 CFR 9239.0-9.

/s/ Curtis G. Tucker (Signature)

Area Manager (Title)

[Certificate of Service omitted in printing]

[Attached to Defendants' Brief on Mineral Ownership (Dist. Ct. Docket No. 20)]

N57158
9230
(NV-055.05)

CERTIFIED MAIL P 504 307 806
RETURN RECEIPT REQUESTED

APR 23 1993

DECISION

Earl Williams
750 Fogg
Las Vegas, NV 89110

NOTICE OF TRESPASS

On April 16, 1993 the Caliente Resource Area office received your response to Trespass Notice (N57158). Careful consideration has been given to the information you have submitted and it is our opinion that you are in mineral material trespass for removing mineral materials reserved to the Federal Government under the Act of Congress of October 22, 1919 (41 Stat. 293-295), also known as the Pittman Act, without authorization of the U.S. Government. Section 8 of the Pittman Act states:

> "That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and

> other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

In the case of Watt v. Western Nuclear, Inc., 103 S. Ct. 2218, the United States Supreme Court ruled that "gravel is a mineral reserved to the United States in lands patented under the Stock-Raising Homestead Act." Further the Supreme Court ruled that:

> "Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. . .Insofar as the purposes of the SRHA are concerned, it is irrelevant that gravel is not metalliferous and does not have a definite chemical composition. What is significant is that gravel can be taken from the soil and used for commercial purposes."

As a result of the extraction and removal of mineral materials reserved to the U.S. Government without proper authorization, it is our opinion that you have violated Revised Statute 2478; 43 U.S.C. 1201 and Sections 302 and 310 of the Federal Land Policy Management Act of 1976 as amended; 43 U.S.C. 1732, 1740; and that you are in violation of 43 CFR 9239.0-7 which states:

> "The extraction, severance, injury, or removal of timber or mineral materials from public land under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass.

Trespassers will be liable in damages to the United States, and will be subject to prosecution of such unlawful acts."

The above stated violation occurred in T.11S., R.62E, Section 24 E1/2, E1/2 W1/2 and T.11S., R.62E., Section 25 E1/2 NE1/4; Mount Diablo Meridian, Lincoln County, Nevada. By your continued removal and sale of sand and gravel without the benefit of a mineral materials contract issued by the Bureau of Land Management, it is our opinion that you committed an act of innocent trespass.

Operations, if continuing, must stop immediately. No further removal of mineral material can take place without a contract from the Bureau of Land Management. Continued removal of mineral materials without a BLM contract from the parcel of land described above after receiving this Decision will be considered an act of willful trespass and will result in issuance of citations for theft of government property.

Nevada State law does not prescribe the measure of trespass damages for minerals or mineral materials, such as sand, gravel, and stone. For a minerals trespass in a state where State law does not govern mineral trespass, the provisions of 43 CFR 9230.1-3 (see Code of Federal Regulations, 1992) sets the measure of damages to be applied in a mineral trespass. The measure of damages for innocent trespass are the value of the minerals in place. The measure of damages for a willful trespass is the full value of the material at the time of sale (conversion) without a deduction for labor bestowed or expenses incurred in removing and marketing the material. The cost of transporting the material from the pit to the point of sale is not considered in the trespass.

To resolve this trespass, you must supply the Caliente Resource Area Office all records from beginning of production on the above described parcel to the date of receipt of this Decision. In order to effect settlement, you

must provide copies of all sales records and haul records (certified copies of mining records showing the names, addresses, and telephone numbers of buyers, quantities of materials sold, and dates of delivery) from the subject parcel of land. The amount of differentiated material (i.e., Type II, Reject Sand, Pit Run) should be identified.

The BLM is currently engaged in the process of calculating the volume of mineral material removed from the site by this trespass. This amount will be compared with the figures provided by you as to the amount of material removed and sold from the site.

You have 30 dyas from the date of receiving this letter to supply the above described information. Failure to comply with this decision may result in the BLM further pursuing civil and criminal action to be taken for theft of government property.

Within 30 days of receipt of this decision, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1840-2, Information on Taking Appeals to the Board of Land Appeals. Within 30 days after you appeal, you are required to provide a Statement of Reasons to the Board of Land Appeals and a copy to the Regional Solicitor's Office listed in Item 3 on the form. In addition, please provide this office with a copy of your Statement of Reasons. The appellant has the burden of showing that the decision appealed from is in error.

In addition, within 30 days of receipt of this Decision, you have the right to file a petition for a stay (suspension) of the Decision together with your appeal in accordance with the regulations at 43 CFR 4.21. The petition must be served upon the same parties specified above. The appellant has the burden of proof to demonstrate that a stay should be granted.

/s/ Curtis G. Tucker
Curtis G. Tucker
Area Manager

Enclosure

cc: Ed Seum
NV053

TRESPASS.LE1
SFLOCK/wm 04/23/93

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEDROC LIMITED, L.L.C., et al.	)	
	)	
Plaintiffs/Counterdefendants,	)	
	)	
v.	)	CV-S-98-01012-PMP (LRL)
	)	
THE UNITED STATES OF AMERICA et al.,	)	
	)	
Defendants/ Counterclaimant.	)	
	)	

DECLARATION OF JERRY B. FANT

Pursuant to 28 U.S.C. § 1746, I, JERRY B. FANT, declare as follows:

1. I am a geologist with the Ely Field Office of the United States Department of the Interior, Bureau of Land Management. I have been employed in this position since February 22, 1993.

2. I received a Bachelor of Science Degree from Northeast Louisiana University in 1980.

3. In connection with my studies to become a geologist

and in my duties as a geologist, I have learned the appropriate methodology to measure irregularly shaped structures and to calculate the volume of those structures.

4. I am familiar with the same and gravel operations conducted by Bedroc Limited, L.L.C. ("Bedroc"), and have visited those operations on several occasions. I am familiar with the acreage disturbed by Bedroc's sand and gravel operations. Bedroc has provided the Bureau of Land Management with maps showing the area disturbed, and I have visited the site on several occasions.

5. In my visits to the Bedroc sand and gravel operations, I have seen piles of material that I would characterize as topsoil located on the west side of Bedroc's excavation and one topsoil stockpile to the south of Bedroc's excavations as well as other smaller stockpiles that were not mapped or considered in making the calculations in this declaration due to time constraints.

6. In early March, 1999, I traveled to the Bedroc location and examined the topsoil stockpiles. These piles appear to be overburden that were pushed from off of the top of the area where Bedroc is conducting its mining operation. I measured the length, width and height of most but not all of the piles of topsoil. The topsoil stockpile along the west side of the excavation has a very irregular shape and was difficult to map. Also, Bedroc's operations have captured the east-central and southeastern portion of the western topsoil stockpile.

7. After taking the measurements, I calculated the volume of the material. These calculations took into account the possible material removed and the length, width and height measurements were averaged together. Based on my measurements and calculations, I estimate that the total volume of topsoil in the stockpiles to be 54,300 cubic yards.

8. Based on my review of the maps provided by Bedroc to the Bureau of Land Management and my recollection of the site, it appears that Bedroc has disturbed and removed sand and gravel from approximately 16.2 acres. There are 43,560 square feet in each acre. A cubic yard contains 27 cubic feet of material. To cover one acre one foot deep in topsoil you would have to have 43,560 cubic feet of topsoil. Using the 54,300 cubic yard topsoil figure, one would have enough to cover the entire 16.2 acre area with a two foot thick cover of topsoil. From these calculations, it appears that Bedroc removed on average approximately two feet of top soil from the 16.2 acres in order to reach the sand and gravel deposits. I do not know the original surface topography of the disturbed area but the depth of topsoil on the original surface probably varied from place to place and was not uniformly two feet deep.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18 day of March, 1999, at Caliente, Nevada.

/s/ Jerry B. Fant

Jerry B. Fant

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

LANDS AND MINERALS
DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1914

H.D. MCCASKEY
Geologist in Charge, Division of
Mineral Resources

PART II – NONMETALS

E.F. BUECHARD, Geologist in Charge

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

SAND AND GRAVEL

By G.F. LOUGHLIN.

PRODUCTION.

HISTORICAL REVIEW.

In 1902 the value of sand crushed from sandstone and used in the manufacture of glass was for the first time separated from the figures given for stone by the United States Geological Survey and was published in a separate report, which included also the value of other sand used for glass. The process of collecting the figures for 1902 and 1903 revealed a considerable quantity of sand used for molding, building, and various other purposes, and in 1904 it was possible to show approximately the total quantity and value of such sand produced for that year. In 1905 more complete statistics of the total production of sand were obtained, and it was also possible to tabulate the approximate production of gravel. The following table shows the total production of sand and gravel, including glass sand, from 1904 to 1914:

Quantity and value of sand and gravel produced in the United States, 1904-1914, in short tons.

Year.	Quantity.	Value.
1904.....	10,679,723	• $ 5,748,099
1905.....	23,204,967	11,223,645
1906.....	32,932,002	12,698,208
1907.....	41,851,918	14,492,069
1908.....	37,216,044	13,270,032
1909.....	59,565,551	18,336,990

1910.....	69,410,436	21,037,630
1911.....	65,846,959	21,158,583
1912.....	68,354,561	23,113,206
1913.....	79,555,849	24,217,508
1914.....	79,281,735	23,846,999

• Includes a very small quantity of gravel.

More complete returns account principally for the large apparent increase during recent years as compared with 1904. The large increase in quantity and the small increase in value in 1906 and 1907 were mainly in the production of cheap gravel for filling, road ballast, and other uses. In 1908 there was, as in most other industries, a decrease in both quantity and value of production, owing to unsettled financial conditions, but in 1909 there was a large increase, due to the great activity in the building trades, in railroad building, and in the iron industry. In glass sand, however, there was only a slight increase. The production of glass sand and molding and building sand continued to increase in 1910. In 1911 there was a small decrease in total production, although the production of glass sand continued to increase. In 1912 and 1913 the total production increased, though special conditions caused a decrease in the production of certain kinds of sand.

With the exception of 1908 and 1911 there has been a steady increase in total production in both quantity and value to 1913, inclusive. The production in 1914, however, shows a decrease in quantity and in value.

PRODUCTION IN 1914.

In view of slackened building demand in 1914 the decrease in output of sand and gravel was relatively small.

The total production of sand and gravel in the United States in 1914 reported directly to the United States Geological Survey was 79,281,735 short tons, valued at $23,846,999, a decrease in quantity of 277,144 short tons and in value of $370,509 from the production of 1913. It exceeded, however, by 10,927,174 tons in quantity and $733,791 in value the production of 1912, and by 9,871,299 tons in quantity and $2,809,369 in value the production of 1910, when the largest output previous to that of 1913 was recorded.

Notwithstanding the decrease in total production, there was increase in the value of grinding and polishing sand, of paving sand, of sand for railroad ballast, and especially of gravel. The most conspicuous decrease in value was in molding sand in fire and engine sand.

Trade conditions in most of the States which show large production were not so favorable in 1914 as in 1913. In the important Eastern States most producers reported conditions to be poor, although a small number had in creased production, owing to local demand. The same condition prevailed in the Central States, with the exception of Michigan and Iowa, where the producers who reported conditions as about the same as in 1913 were more numerous than those who reported decreased production. In California more than 50 per cent of the producers reported better conditions in 1914 than in 1913.

The following table gives the total production of glass sand in the United States from 1902 and 1914, inclusive:

Quantity and value of glass sand produced in the United States, 1902-1914, in short tons.

Year.	Quantity.	Value.	Average price per ton.
1902.....	943,135	$807,797	$0.86
1903.....	823,044	855,828	1.04
1904.....	858,719	796,492	.92
1905.....	1,060,334	1,107,730	1.04
1906.....	1,089,430	1,208,783	1.11
1907.....	1,187,296	1,250,067	1.05
1908.....	1,093,553	1,134,599	1.04
1909.....	1,104,451	1,163,375	1.05
1910.....	1,461,098	1,516,711	1.04
1911.....	1,538,666	1,543,733	1.01
1912.....	1,465,386	1,430,471	.97
1913.....	1,791,800	1,895,991	1.06
1914.....	1,619,649	1,568,030	.97

The production of glass sand in 1914 amounted to 1,619,649 short tons, valued at $1,568,030, a decrease of 172,151 tons, or 9.6 per cent, in quantity and of $327,961, or 17.3 per cent, in value from the production of 1913. The average price per ton fell from $1.06 in 1913 to $0.97.

The following table gives the production of molding sand in the United States since 1904, when the first statistics of molding sand were collected:

Quantity and value of molding sand produced in the United States, 1904-1914, in short tons.

Year.	Quantity.	Value.	Average price per ton.
1904.....	3,439,214	$2,125,370	$0.62
1905.....	3,084,098	2,102,423	0.68

1906.....	3,371,103	2,063,151	0.61
1907.....	3,682,494	2,460,754	0.67
1908.....	1,980,677	1,342,802	0.67
1909.....	3,122,806	2,146,220	0.68
1910.....	3,636,167	2,431,254	0.67
1911.....	3,376,717	2,132,469	0.63
1912.....	4,485,380	2,718,726	0.61
1913.....	3,563,583	2,230,217	0.63
1914.....	2,751,209	1,756,383	0.64

The decrease in the production of molding sand in 1914 was 812,374 short tons and $473,834, or 22.7 per cent in quantity and 21.2 per cent in value. The average price increased from 63 cents to 64 cents a ton. The production of molding sand in 1914 was less than in any year since statistics have been collected by the Survey, with the exception of 1908. The decrease in that year was even more than in 1914, but the recovery was rapid and the production two years later, in 1910, was the greatest in quantity that has been recorded. The production of molding sand reflects to a considerable extent the condition of the iron and steel industry.

The following tables give the production of the various kinds of sand and the production of gravel by States in 1913 and 1914:

[Tables omitted]

* * *

Sand for building purposes constituted, as in previous years, more than one-half of the total sand production. The production in 1914 was 24,003,962 short tons, valued at $7,688,774. This was a decrease of 1,393,421 tons, or 5.4 per cent, in quantity and of $319,275, or 3.9 per cent, in value from the production of 1913. The average price per

ton, which increased from 31 cents in 1911 to 33½ cents in 1912 and decreased to 31½ cents in 1913, increased to 32 cents in 1914. Decrease in output and value was not general, as some producers reported an increase both in quantity and in price per ton.

The production of grinding and polishing sand, which decreased in 1913, showed a marked increase in 1914 and was again above 1,000,000 tons. Although the output was 100,000 tons less than in 1912 (the year of highest production), it was more than 200,000 tons greater than in 1911. The production in 1914 was 1,084,871 tons, valued at $652,388, an increase in quantity of 143,498 tons and in value of $111,989 over the production for 1913.

The production of fire sand and furnace sand, like that of molding sand, decreased greatly. The quantity produced in 1914 was 318,560 tons and the value was $187,467, against 519,061 tons, valued at $364,363, in 1913, a decrease of 200,501 tons in quantity and of $176,896 in value.

The production of engine sand increased in quantity from 1,033,450 tons in 1913 to 1,262,790 tons in 1914, but the value decreased from $401,806 to $367,548.

Paving-sand production increased slightly in both quantity and value, from 3,335,508 tons, valued at $1,020,389, in 1913 to 3,580,171 tons, valued at $1,121,999, in 1914.

The production of sand for railroad ballast actually reported to the Survey was 2,116,429 tons, valued at $322,740, in 1914, as against 2,335,196 tons, valued at $266,852, in 1913. The increase in value, notwithstanding a comparatively small decrease in quantity, is notable.

The reported production does not represent the total quantity of sand used for ballast by the railroads, for the reason that some railroads keep no record of the quantity of sand produced and used by them in making cuts and in ballasting their roadbeds. With them it is only a matter of moving material from one point on the right of way to another point.

The production of gravel in 1914 exceeded that of building sand by more than 15,000,000 tons, an excess which was 2,000,000 tons more than that in 1913. The total production of gravel in 1914 was 39,212,858 tons, valued at $9,398,897, an increase in quantity of 686,360 tons and in value of $556,086 over the production of 1913. Those figures show an average cost per ton of nearly 25 cents, as compared with slightly less than 23 cents in 1913 and about 26 cents in 1912. This large quantity of gravel was used for many purposes, including concrete, paving, filter beds, roofing, road making, and railroad ballast. The total production of all kinds of sand in 1914 was 40,068,877 short tons, valued at $14,448,102, an excess of 856,019 tons in quantity and of $5,049,205 in value over the production and value of gravel during that year.

The entire report of the production of sand and gravel is necessarily incomplete, because it is impracticable to attempt to get reports or to estimate the quantity of sand produced by the thousands of individuals who each year dig a small quantity for their own use. This production of which there is no count or accounting, may average less than a ton for the individual producer, but the aggregate may be hundreds of thousands of tons. The figures each succeeding year should be nearer the actual production, as the list of producers is added to annually.

The gravel figures for 1914 do not include a considerable quantity of chats or tailings from the Missouri zinc mines. The production of chats in Missouri in 1914 was 2,270,771 tons, valued at $340,616.

The unit of measurement given in the tables of production is the short ton. Much of the sand is reported as sold by the cubic yard, a cubic yard varying in weight from 2,300 to 3,000 pounds, according to the condition of the sand, to the material of which the gravel is composed, and to the custom of the locality. All of the glass sand is sold by the short ton, and also a considerable quantity of the molding, building, and other sand; hence the quantities reported were all reduced to this unit.

IMPORTS.

Sand valued at $139,675 was imported into the United States in 1914, as compared with imports valued at $172,257 in 1913, $141,690 in 1912, and $147,268 in 1911. This is largely building sand brought to the United States as ballast, or from Canada as a near source of supply; but it includes a small quantity of French molding sand which comes to this country barreled in lump and is here ground and pulverized before marketing.

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1915

H.D. MCCASKEY
Geologist in Charge, Division of Mineral Resources

PART II – NONMETALS

E.F. BUECHARD, Geologist in Charge

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

SAND AND GRAVEL

By R.W. STONE.

TRADE CONDITIONS.

Depression in business during the early part of 1915 and heavy rainfall in some parts of the country account in part for the slight falling off in total production of sand and gravel in 1915. A tabulation of reports on conditions in the sand industry in the principal producing States follows:

Firms reporting condition of sand and grave industry in principal producing States in 191 in comparison with 1914.

State.	Better.	Same.	Worse.
Illinois	29	17	22
Indiana	37	13	25
Michigan	68	49	60
New York	29	23	22
Ohio	58	28	47
Pennsylvania	62	33	43
	281	163	219

This table shows a tendency toward larger business, and the showing is confirmed by the increased quantities of glass, molding, fire, engine, and railroad ballast sand used in 1915 as compared with 1914, as indicated in the tables of production in this report.

The glass business has been very active and continues to be active at this time (June, 1916), partly because of

decreased imports and increased exports of glass, which has naturally resulted in a considerable increase in the quantity of glass sand produced. The output of glass sand in 1915 is the largest ever reported by the United States Geological Survey, but the average price per ton is the lowest, having fallen from 97 cents in 1914 to 85 cents in 1915, as shown in the following table:

Glass sand produced in the United States, 1902-1915.

Year.	Quantity. (short tons).	Value.	Average price per ton.
1902	943,135	$ 807,797	$0.86
1903	823,044	855,828	1.04
1904	858,719	796,492	.92
1905	1,060,334	1,107,730	1.04
1906	1,089,430	1,208,788	1.11
1907	1,187,296	1,250,067	1.05
1908	1,093,553	1,134,599	1.04
1909	1,104,451	1,163,375	1.05
1910	1,461,089	1,516,711	1.04
1911	1,538,666	1,543,733	1.01
1912	1,465,386	1,430,471	.97
1913	1,791,800	1,895,991	1.06
1914	1,619,649	1,588,030	.97
1915	1,884,044	1,606,640	.85

Molding sand reached its highest production in 1912 and then fell off during the two succeeding years. In 1915, however, there was a marked recovery. Foreign demand for vast supplies of machinery and munitions, requiring the casting of metal compelled the use of a much greater quantity of molding sand in 1915 than in 1914.

Molding sand produced in the United States 1904-1915.

Year.	Quantity. (short tons).	Value.	Average price per ton.
1904.....	3,439,214	$2,125,370	$0.62
1905.....	3,084,098	2,102,423	0.68
1906.....	3,371,103	2,063,151	0.61
1907.....	3,682,494	2,460,754	0.67
1908.....	1,980,677	1,342,802	0.67
1909.....	3,122,806	2,146,220	0.68
1910.....	3,636,167	2,431,254	0.67
1911.....	3,376,717	2,132,469	0.63
1912.....	4,485,380	2,718,726	0.61
1913.....	3,563,583	2,230,217	0.63
1914.....	2,751,209	1,756,383	0.64
1915.....	3,585,746	2,123,203	0.59

For the same reason the quantity of fire and furnace sand required for lining furnaces, for ladles used to contain molten metal, and for making runners for casting pig iron was 65 per cent greater in 1915 than in 1914. There was a decrease in the average price per ton, however, from 59 cents in 1914 to 34 cents in 1915.

PRODUCTION.

The following tables have been prepared by Mrs. L. L. Kimball, statistical clerk, from reports received from thousands of producers throughout the United States:

[Tables Omitted]

* * *

IMPORTS.

Sand valued at $96,754 was imported into the United States in 1915, as compared with imports valued at $139,675 in 1914, and at $172,257 in 1913. This is largely building sand brought to the United States as ballast or from Canada as a near source of supply but it includes a small quantity of French molding sand imported for making fine bronze castings.

GLASS-SAND LOCALITIES.

Because of the increase in the glass business and of the consequent large demand for glass sand, two lists of glass-sand localities in the United States are given herewith.

Localities where glass sand was reported as produced in 1915.

Arkansas: Ruddells.
California: Ione and Lake Majella.
Georgia: Howard and Lumber City.
Illinois: Millington, Oregon, and Ottawa.
Indiana: Coxville and Michigan City.
Iowa: Clayton.
Kentucky: Olive Hill.
Maryland: Robinson.
Massachusetts: Cheshire.
Michigan: Rockwood and Steiner.
Missouri: Crystal City, Klondike, Pacific, St. Louis, and Silica.
New Jersey: Cedarville, Millville, Penbryn, South Vineland, and Williamstown Junction.
Ohio: Austintown, Barberton, Dayton, Hartford, Howard, Macedonia, Massillon, Rockbridge, Silica, and Tobasco.
Oklahoma: Hickory, Oklahoma City, and Roff.

Pennsylvania: Berne, Bingham, Caln, Daguschonda, Derry, Dunbar, Falls Creek, Hamilton, Kennerdell, Mapleton, Newton, Reading, Ridgeway, St. Marys, and Vineyard.
South Carolina: Blackville.
Virginia: Bristol and Mendota.
West Virginia: Berkeley Springs, Buckhannon, Hinton, Independence, Sturgisson, Terra Alta (Holmes Station), and West Berkeley.

Localities where glass sand occurs.

Alabama: Jefferson County, from crushed sandstone at Gates City; Etowah County, Gadsen.
Arkansas: Izard County, Guion and Ruddells; Jefferson County, Pine Bluff; St. Peter sandstone along valley of White River from Batesville nearly to Fayetteville, probably will make excellent glass sand.
California: Almeda County; Tesla; Amador County, Ione; Los Angeles County, Palmdale; Monterey County, Pacific Grove; San Joaquin County, near Stockton.
Delaware: Newcastle County, Christiana.
Florida: Escambia County, dunes at Pensacola; probably occurs at other places in State.
Georgia: Crawford County, Zenith; Montgomery County, Lumber City; Richmond County, dredged from Savannah River at Augusta; Taylor County, Butler, and Howard.
Illinois: Bond County, Greenville; Calhoun County, Cap au Iris; Kendall County, Millington; LaSalle County, important quarries in St. Peter sandstone at Ottawa, Utica, and Wedron; Lee and Ogle counties, along Rick River.
Indiana: Blackford County, Montpelier; Floyd County, New Albany; Fountain County, near Hillsboro; Green County, Johnson; Hamilton County, Lapel; Harrison County, Depauw; La Porte County, Michigan City;

Madison County, Pendleton; Martin County, Loogootee; Parke County, Corville; White County, Welcott.
Iowa: Allamakee County, abundant in St. Peter Sandstone; Clayton County, Clayton; Johnson County, River Junction; Linn County, Cedar Rapids.
Kansas: Montgomery County, near Caney and Independence, friable sandstone in Buxton formation in suitable quality; Wilson County, Fredonia.
Kentucky: Calloway County, in hills bordering Beechy Creek; Carter County, Lawton and Olive Hill; Hardin County, Tip Top; Kenton County, Ludlow.
Maine: Knox County, Camden; Waldo County, Liberty.
Maryland: Anne Arundel County, Robinson, Magothy River; Baltimore County, Catonsville; Washington County, Rock Forge; also in Cecil, Harford, and Kent counties.
Massachusetts: Berkshire County, made from granular quartzite at Cheshire and Washington; Dukes County, Tertiary sands at Gay Head and Marthas Vineyard.
Michigan: Monreo County, near Steiner; Wayne County, near Rockwood.
Mississippi: Hinds County, at Bryam, Jackson, and elsewhere along Pearl River; Jackson County, Horn Island; Tisboringo County, large deposit 1 mile from Tennessee River.
Missouri: St. Peter sandstone suitable for glass sand outcrops in a belt from a thin strip to 20 miles wide along Mississippi River from Ralls County to Cape Girardeau County and also up Missouri River as far as Calloway County. Important quarries: Franklin County, Becker, Gray Summit, and Pacific; Jefferson County, Crystal City and Silica; St. Charles County, Klondike.
Nevada: Ormaby County, 4 miles from Carson.
New Jersey: Camden County, Penbryn, Williamstown Junction, and Wilton; Cumberland County, Cedarville, Millville, and South Vineland; Gloucester County, Williamstown; Middlesex County, Jamesburg.

New York: Oneida County, Durhamville; Oswego County, Cleveland and Minetto; Schenectady County, Niakayuna; Ulster County, sandstone at Ellenville.

Ohio: Sandstones of Silurian or carboniferous age quarried and crushed; Erie County, Sandusky; Hocking County, Rockbridge; Knox County, Howard; Licking County, Tobasco; Lucas County, Sylvania; Mahoning County, Austintown; Muskingum County, Zanesville; Perry County, Chalfants; Stark County, Massillon; Summit county, Barberton, Macedonia, and Warwick; Trumbull County, Hartford and Niles; Tuscarawas County, Dundee.

Oklahoma: Arbuckle Mountains, sandstone of Simpson formation; southeastern Oklahoma north of Red River, Trinity sand; Cherokee County, St. Peter sandstone near Tahlequah.

Pennsylvania: Berks County, Berne and Reading; Chester County, Calp; Clearfield County, Falls Creek; Elk County, Daguscahonda, Ridgeway, and St. Marys; Fayette County, Dunbar, and along Monongahela River near Belle Vernon; Huntingdon County, Mapleton; McKean County, Bingham; Mifflin County, Hamilton, Newton, and Vineyard; Venango County, Kennerdell and Rochmere Station (near Oil City); Westmoreland County, Derry.

South Carolina: Barnwell County, Blackville and Ulmers; Clarendon County, Pee Dee.

South Dakota: Meade County, Unkpapa sandstone on Elm Creek.

Tennessee: Anderson County, Coal Creek; Benton County, abundant friable sandstone; Blount County, Chilhowee; Hardeman County, Saulsbury; Knox County, Knoxville; Montgomery County, abundant friable sandstone; Sullivan County, 20 miles from Bristol.

Texas: Grayson County, Denison.

Vermont: Bennington County, East Dorset, disintegrated quartz once used; Windsor County, Plymouth.

Virginia: Fine white sand of suitable quality occurs along eastern edge of middle Valley region –Amherst County, Stapleton Mills; Augusta County, Greenville; Rockbridge County, Balcony Falls, along west base of Blue Ridge; Roanoke County, Catawba Mountain, 9 miles northwest of Salem; Washington County, Bristol and Mendota.

West Virginia: Monongalia County, Sturginson; Morgan County, Berkeley Springs; Preston County, Holmes Station, near Independence; Randolph County, Silica; Taylor County, Grafton; Upsbur County Buckhannon, Craddock.

Wisconsin: Columbia County, Protage; Monroe County, Tomah; Rock County, Beloit; St. Peter sandstone in many localities as at Waukau, Winnebago County.

Wyoming: Albany County, soft sandstone, 3 miles east of Laramie.

WEIGHT OF SAND AND GRAVEL PER CUBIC YARD.

The production of sand and gravel is reported by the survey short tons, but some of it is reported to the Survey in cubic yards so that it has been necessary to make inquiry of the producers as the weight of the cubic yard of sand and gravel sold by them in order to convert their figures into tons. The result of this inquiry is a determination for the whole country of an approximate average weight per cubic yard of 2,665 pounds for sand and of 2,820 pounds for gravel. According to the reports of 670 producers of sand and of 560 producers of gravel who reported to the Geological Survey in cubic yards instead of tons, the weight of a cubic yard of sand varies from 2,200 pounds to 4,000 pounds and the weight of cubic yard of gravel from 2,200 pounds to 4,200 pounds. Any weight above 3,300 pounds a cubic yard for sand is very unusual,

for of the 670 producers replying to the question, only 12 reported above that weight and only 22 reported above 3,000 pounds. It is surmised that the sands reported as weighing over 3,000 pounds were weighed wet, or that the reported weight was only a guess, or that the composition was unusual; for a cubic yard of pure quartz closely packed should weigh 3,240 pounds.

It may be that many of the weights reported to the Survey are guesses and not actual determinations, but even if this is so the expression of opinion of several hundred producers should give a very fair average weight. The average weights of sand and gravel in those States in which 10 or more producers reported figures are as follows:

Reported weights of sand and gravel to the cubic yard, in pounds.

State.	Sand.	Gravel.
Alabama	2,505	2,790
California	2,645	2,895
Florida	2,605	2,680
Illinois	2,820	3,005
Indiana	2,700	2,945
Iowa	2,720	2,850
Kentucky	2,580	2,830
Massachusetts	2,710	2,810
Michigan	2,895	2,985
Minnesota	2,865	2,880
Missouri	2,680	2,840
New Jersey	2,600	2,730
New York	2,590	2,760
Ohio	2,700	2,830
Oregon	2,620	2,880
Pennsylvania	2,500	2,680

Texas	2,695	2,910
Washington	2,930	3,065
West Virginia	2,570	2,780
Wisconsin	2,800	2,970

It is noticeable that the highest average weights for both sand and gravel are shown by Illinois, Michigan, Minnesota, Washington, and Wisconsin. If there is any special significance to this it is not apparent to the writer.

The figures given above for Illinois, Indiana, Iowa, Michigan, New York, Ohio, and Wisconsin are averages from the reports of 30 to 65 producers; the averages for the other States are from fewer producers. A cubic yard of sand of spherical grains of uniform size and a cubic yard of gravel of the same mineral composition and consisting of round pebbles, all of the same size, should have the same weight, for the pore space would be equal and about 27 per cent of the volume.

There are two principal reasons, however, why gravel weighs more than the same volume of sand. One is the difference in mineral composition, and the other the greater variation in size of component parts. Gravel is commonly composed of rock fragments which contain quartz, feldspar, and ferromagnesian minerals; quartz is the least soluble of these and forms the greater part of most sands, the heavier and more easily disintegrated minerals being reduced to silt. Sand, therefore, as a usual thing, is lighter than the gravel from which it is derived because the lighter mineral forms a greater percentage of the whole. Second, sand is comparatively even-grained and, therefore, has considerable pore space, while the ordinary run of unsized gravel has a wide range in size of individual pebbles, which results in a considerable reduction

in pore space. It is largely the lack of close sizing that gives ordinary gravel a greater weight per unit of volume than the same volume of sand.

In connection with the discussion now going on among dealers as to the advisability or advantage of selling sand and gravel by weight rather than by volume, attention is directed to the results of laboratory tests on sands derived from 19 different localities in western Washington, kindly furnished to the Survey by the analyst, Mr. R.J. Borhek, of Tacoma, Wash. Samples of sand were thoroughly dried, poured into a cylinder having a capacity of one-fifth of a cubic foot, shaken until settling ceased, and then weighed. The weights computed for a cubic yard range from 2,692 to 3,164 pounds, the average being 3,020 pounds for 19 samples. On comparing this with the average of 2,930 pounds per cubic yard derived from the reports of 10 dealers in the same area, whose estimates ranged from 2,500 to 3,200 pounds per cubic yard, the suggestion at once arises that the consumer who buys sand by the cubic yard may be getting nearly 100 pounds more per yard than the dealer estimates. It is obvious, however that the consumer is at a disadvantage in purchasing sand by weight if the material has not been dried and kept under cover, and most sand is not so treated. A yard of building sand would weigh more when it was just pumped from the river than after it had drained and dried on the dock, or more after a shower than after a day in the sun. Furthermore, weighing causes a slight loss of time in delivery. The sale of sand and gravel by the yard, on the other hand, is haphazard, for wagon boxes vary in capacity, the exact capacity is not known to the loader, and one load may be heaped higher than another.

CHATS.

The tables of production given above do not include a considerable quantity of chats or tailings from the Missouri zinc mines. This waste product, which is used on roads, has a nominal value of 10 cents a ton, or the cost of loading. The shipment of chats in Missouri in 1915, as reported by the Missouri Bureau of Geology and Mines, was 2,309,191 tons, compared with 2,270,771 tons in 1914.

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1916

H.D. McCASKEY
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Mineral Resources

PART II – NONMETALS

E.F. BURCHARD and G.F. LOUGHLIN,
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[SEAL]

WASHINGTON
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1919

SAND AND GRAVEL

By R. W. STONE.

TRADE CONDITIONS.

In 1916 the production of sand and gravel was unprecedentedly large. All kinds of sands increased in total value, and most of them increased in quantity, in spite of the fact that car and labor shortage limited the output of many sand and gravel pits. From many parts of the country it was reported by producers that they could not get enough men to operate at the desired capacity or enough cars to meet their requirements.

In 1915 for the first time a tabulation was made of the condition of the sand and gravel industry as reported in those States having the largest number of producers. Only a small proportion of the thousands of producers of sand and gravel who report annually to the United States Geological Survey answer the question as to their business condition compared with that of the preceding year. Of the 663 producers in six States who reported on the condition of the business in 1915, 281, or 42 per cent, said that the situation was better than in 1914, and 219, or 33 per cent, said it was worse. In 1916 a much larger number replied to this question. In the 838 answers from six States, 54 per cent reported business as better than in 1915, and only 22 per cent reported it worse. A tabulation of these reports on business conditions follows:

Firms reporting condition of sand and gravel industry in 1916 in comparison with 1915.

State.	Better.	Same.	Worse.
Illinois	62	38	24
Indiana	62	30	19
Michigan	92	39	75
New York	55	9	24
Ohio	96	42	19
Pennsylvania	88	36	28
	455	194	189

The tendency toward larger business as shown in this table, the evidence of increased output given in tables on the following pages, and the trend of business in the summer of 1917 indicate that the production of sand and gravel in 1917 will far exceed in quantity and value the production of any previous year.

PRODUCTION.

The tables for 1916 have been prepared by Mrs. L. M. Beach, statistical clerk, from reports received from thousands of producers throughout the United States. Were it not for the fact that many producers delay sending in their reports until June or July, this information would be published much earlier in the year.

[Tables omitted.]

* * *

It is believed that the production in 1917 will be considerably greater and that the average price per ton will exceed $1, as an increased output is promised by larger demands and new uses for glass. As a structural

material glass has an increasing use – for example, in the larger window area demanded in new office, factory, and school buildings. A new use for glass is in making coffins. A glass coffin molded in one piece, with a hermetically sealed cover, takes the place of a wooden coffin and a steel or slate vault.

GLASS-SAND LOCALITIES.

The resources of the United States in sand suitable for making the more common kinds of glass are very great. Eighteen States produced glass sand in 1916, and it occurs in other States in numerous localities.

Localities where glass sand was reported as produced in 1916.

California: Ione and Lake Majella.
Georgia: Lumber City.
Illinois: Millington, Oregon, and Ottawa.
Indiana: Michigan City.
Iowa: Clayton.
Kentucky: Olive Hill.
Louisiana: Opelousas.
Maryland: Robinson and Hancock.
Massachusetts: Cheshire.
Michigan: Steiner.
Missouri: Crystal City, Klondike, Pacific, and Silica.
New Jersey: Bordentown, Cedarville, Jamesburg, Millville, Penbryn, South Vineland, and Williamstown Junction.
New York: Cleveland.
Ohio: Austintown, Barberton, Howard, Massillon, New Lexington, Silica, and Toboso.
Oklahoma: Hickory, Oklahoma City, and Roff.
Pennsylvania: Daguscahonda, Derry, Dunbar, Falls Creek, Hamilton, Kennerdell, Lewistown, Mapleton, Newton, Parrish, Ridgeway, St. Marys, Torpedo, and Vineyard.
Texas: Santa Anna.

West Virginia: Berkeley Springs, Buckhannon, Independence, Sturgisson, Terra Alta (Holmes Station), and West Berkeley.

REQUIREMENTS OF GLASS SAND.

The factors which determine the value of a deposit for making glass are chemical purity, physical character, quarrying conditions, and location with respect to transportation, cheap fuel, and market.

Glass is a transparent impermeable substance formed by fusing sand, or silica, with fixed alkalies. It is made by melting the ingredients in a pot or tank, mixing the batch thoroughly, and allowing it to cool. It is molded into the desired form while molten. Sand is the principal constituent of all glass, comprising from 52 to 65 per cent of the mass of the original mixture. The qualities of the glass, such as lack of color, brilliance, transparency, and hardness, depend largely, therefore, on the quality of the sand.

For the finest ware only the purest quartz (silica) sand can be employed because slight impurity, especially a small quantity of iron, impairs the brilliance, whiteness, and clearness. Thus, for the manufacture of glass for optical instruments, which is practically colorless, sand, or ground silica, should contain not more than 0.015 per cent of ferric oxide. Plate and window glass are commonly pale green and absolute purity is not essential in the sand, but more than 0.2 per cent of ferric oxide is undesirable. Green and amber glass for rough structural work, as skylights, sidewalk lights, for bottles, jars, and insulators, are made from sand that has more impurity than is permissible in sand for plate glass and prescription ware.

The suitability of a sand for making glass may be determined roughly by inspecting it for the following properties: The sand should consist almost entirely of quartz, or silica (most glass sands contain from 98 to more than 99 per cent of silica); it should be nearly white or easily washed white; the grains should be uniform in size, either angular or rounded, and preferably should not be larger than 20 mesh nor smaller than 80 mesh. Whiteness is not essential, however, in sand for ordinary window glass and cheap bottles and jars. Sand for window glass that has been dug at a New York locality for many years is pink or dark flesh-colored, and an Indiana sand used for making beer bottles is drab, because of a coating of clay on each of the colorless quartz grains.

Most of the glass sand produced in this country is obtained by crushing soft, crumbly sandstones, but where power is very cheap, it is practicable to produce glass sand by crushing quartzite and vein quartz.

Methods of quarrying and preparing the sand vary somewhat, but in general the quarry face is drilled and shot down with an explosive, and the coarse and fine material is delivered to the mill. If a special quality of sand is desired, selection may be made at the quarry by hand sorting. Large lumps, if very hard, are reduced by a jaw or rotary crusher, but in most places by a less powerful machine, such as a pug mill or muller or a crusher consisting of many heavy hammers revolving rapidly.

Washing the crushed sand is done by two common methods. By one method the sand is carried first upward by a screw conveyor through a long, narrow inclined box against a descending stream of water and then downward in a narrow chute by a second stream of water. This

process is repeated three or four times, after which the sand is spilled on a belt conveyor and carried to the draining piles. Another method of washing is by settling tanks. A stream of sand and water is discharged into a tank where the sand settles and impurities are drained off. Sand washed by this method may be left in the last tank to drain, or it may be carried to a draining pile. Sand carried away by the wash water in either process is caught in settling ponds or yards outside the mill and may be used for the various purposes to which a fine-grained silica sand is adapted.

After draining for several hours, or days, the sand is dried, either rapidly in rotary cylindrical driers heated by gases from coke or other smokeless fuel, or slowly by settling through coils of steam pipes, and is then screened and put in stock bins. Glass sand is shipped in bulk in box cars, which are lined with paper to prevent leakage.

MOLDING SAND.

GENERAL ASPECTS OF THE INDUSTRY.

Under molding sand are included iron, steel, and brass molding sand, core sand, and pig-bed sand.

The effect of the war in Europe on the molding-sand industry in the United States is very apparent. Reports of production made to the United States Geological Survey show an increase of 30 per cent in 1916 over 1915. This great increase was caused by the demand for vast supplies of machinery and munitions for shipment abroad and also for manufacturing and mining machinery for domestic use, all of which required molding sand for casting the metal. The production in 1916 exceeded 4,500,000 tons for the first time and the average price per ton, 69 cents, was the

highest yet recorded. The following table shows the fluctuations of the industry since 1910:

Molding sand produced in the United States, 1910-1916.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	3,636,167	$ 2,431,254	$0.67
1911	3,376,717	2,132,469	.63
1912	4,485,380	2,718,726	.61
1913	3,563,583	2,230,217	.63
1914	2,751,209	1,756,383	.64
1915	3,585,746	2,123,203	.59
1916	4,662,649	3,219,839	.69

Ohio was the leading State in the production of molding sand; Pennsylvania was second, and New York, New Jersey, and Illinois, in the order named, were the next largest producers. These States are also the largest producers of iron and steel castings, for which the molding sand is used.

SUBSTITUTE FOR FRENCH MOLDING SAND.

Molding sand produced at Fontenay aux Roses, near Paris, France, has been imported for r any years for bronze and brass workers. The annual importation is believed to have been about 1,000 casks of 800 pounds weight. The sand is yellow and lumpy and has to be ground and mixed for use. When so prepared it is comparatively even-grained and readily passes a 100-mesh sieve. It is composed almost wholly of quartz, and the grains are mostly subangular, translucent to iron-stained, rarely transparent. This sand has a most durable and

tenacious natural bond and is permeable to gases even when packed. It is used for facing molds for fine bronze castings, particularly statuary and tablets in relief.

Many of the bronze molders in this country are Frenchmen, who have a natural preference for the sand with which they learned their trade. The European war has practically stopped the importation of French sand. The United States Geological Survey, in trying to find a domestic substitute, has discovered that a sand which promises to be satisfactory occurs at West Albany, N. Y., and at Zanesville, Ohio.

Of the West Albany sand, a firm of bronze molders who had been using French sand exclusively wrote: "This sand proved to be just what we wanted." The Zanesville sand is slightly finer grained than the French sand and according to the Bureau of Standards melts at 1,580° C., or 70° lower than the melting point of French sand. After a little experience in their use the molders should be able to get satisfactory results with either of these sands.

BUILDING SAND.

Building sand is used for making plaster, mortar, and concrete. Wall and ceiling plaster, whether made of lime or gypsum, commonly contains a considerable quantity of sand, particularly in the base coat. Mortar used in laying brick, stone, and tile has a body of sand, and sand is a large constituent of much concrete. The reported production of building sand increases annually by reason of larger business and new names added to the list of producers. This sand probably is reported less completely than any other in the foregoing tables because its occurrence is common and widespread, and its use in small amounts by

thousands of individuals is not reported to the Survey. The individual use often is only a wagon load or a few tons, but the aggregate of these of which the Survey gets no record must be hundreds of thousands of tons. In many small villages throughout the United States there is no regular dealer in sand and whoever needs a supply gets it from a local deposit. This may be a privately owned sand pit from which the owner may derive a few dollars a year, or it may be the dry bed of a stream from which sand is taken without charge. Obviously the Survey is unable to get a record of this production.

The recorded production in 1916 was 27,193,462 short tons, valued at $8,569,675, an increase of 4,272,036 tons and of $1,685,408 over the production in 1915.

GRINDING AND POLISHING SAND.

Grinding and polishing sands are sharp, tough, hard sands free from clay or foreign material, and sized for use in sawing, cutting, and polishing stone, for grinding and etching glass, and for cleaning metal castings by means of a blast. Blast sand may be either round or angular grains. Pennsylvania is the largest producer and probably the largest user of these sands.

The total production of grinding, polishing, and blast sand in 1916 was 1,370,354 short tons, valued at $889,651. This was an increase of about 40 per cent in quantity and 100 per cent in value over the production of 1915.

FIRE OR FURNACE SAND.

Pennsylvania was the largest producer of fire or furnace sand, which is a highly refractory silica sand used for lining and patching reverberatory and other furnaces, cupolas, and ladles used to contain molten metal. It is also used for making runners for pig-iron casting. Although the quantity produced in 1916 as reported to the Survey was less than in 1915, the total value was more than double that of the earlier year. The average price per ton in 1915 was about 34 cents; in 1916 it was 90 cents, and considerable quantities brought well over $1 a ton.

OTHER SANDS.

There seems to have been a slight decrease in the quantity of engine sand used in 1916 but an increase in total value. Paving sand showed a marked increase in both quantity and value. Filter sand, a clean silica sand in sorted sizes used for beds in water-filtration plants and in small mechanical filters, is here reported separately for the first time. The production, as shown in the table on pages 332-333, was largely in Iowa and New Jersey.

In the reports of former years railroad ballast sand has been reported separately and railroad ballast gravel has been lumped with gravel for roofing, concrete, and paving under the one head "Gravel." In tabulating the production of 1916 sand and gravel used for railroad ballast were put together for the reason that much of this ballast is a mixture of sand and gravel and not distinctly one or the other. The change results in much larger figures for railroad ballast and decreases the reported production of gravel by several million tons.

The grand total of sand and gravel produced in the United States in 1916 shown an increase of more than 12,000,000 short tons and in value of more than $6,600,000.

CHATS AND VOLCANIC ASH.

The tables of production given above do not include a considerable quantity of chats or tailings from the Missouri zinc mines. This waste product, which is used on roads, has a nominal value of 15 cents a ton, or the cost of loading. The shipment of chats in Missouri in 1916, as reported by the Missouri Bureau of Geology and Mines, was 2,890,970 tons, compared with 2,309,191 tons in 1915.

Neither do the tables include a considerable quantity of volcanic ash mined and used in California for railroad ballast. This material weighs 2,400 pounds per cubic yard, was valued at $967, and is not included in the tables of other chapters of Mineral Resources for 1916.

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1917

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PART II – NONMETALS

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[SEAL]

WASHINGTON
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SAND AND GRAVEL

By R. W. Stone.

INTRODUCTION.

To many people sand is used most commonly for mortar and plaster in building operations, and gravel for concrete and railroad ballast. Were these their only uses the sand and gravel industry would be large but not widely interesting. Sand and gravel are employed in many other ways, however. It is well known that sand and gravel are widely distributed, abundant, and much used in the United States, but their vital importance in the economy of the Nation was scarcely appreciated until war made unusual conditions and demands. The demand has been so great in recent months that in some places on the Atlantic coast sand and gravel have almost attained the status of war minerals. At certain shipbuilding and camp sites there is no gravel readily available and sand suitable for building is scarce. Sand dunes may be abundant, but the grains are too small. So great has been the demand for sand and gravel in large Government construction work that this common and cheap building material has been shipped considerable distances. It is understood that for some of the building recently done near Norfolk, VA., where the supply is inadequate, the sand and gravel were brought from New York, a distance of 300 miles, by sea in coal barges that otherwise would have returned empty; hence the cost of transportation was small.

Only four natural nonmetallic minerals produced in the United States – not including clay products and

cement (manufactured products) – show a greater annual value than that of sand and gravel; these are petroleum, natural gas, coal, and stone. The production of sand and gravel in 1917 was valued at more than $35,000,000. This is an undervaluation, for the list of producers is notably incomplete and it has not been possible to get reports from numerous producers who dig small quantities intermittently for local use.

The statistics in the following tables more nearly represent the actual output of the industry than the reports of previous years, as the list of producers known to the Geological Survey is constantly increasing. It must be admitted, however, that the statistics are incomplete, as there are some States in which almost no producers are known and in all States sand and gravel are produced for local use in hundreds of villages, of which no information is obtained and the aggregate quantity of which must be large.

Most of the producers fill out reports in correct form, and this is especially true perhaps of the members of the National and State associations, for they keep accurate and detailed records of their business and appreciate the importance and use of these statistical data. There are other producers, however, who report sand sold for building in the space provided for glass sand and perhaps give no figures for value. In such cases, if the geologist knows that the material at the locality given is not suitable for making glass, he must write to the producer calling attention to the error and asking for what purposes the sand was actually used and the value of it. When no reply is received, as sometimes happens, it is impossible to give accurate classification. All too frequently producers fail to report value, and the writer is obliged to estimate. If all

producers knew how great is the demand by various Government boards and other organizations for exact information as to producers and production of sand and gravel in different localities, this appeal for better reports, mailed promptly early in the year, would probably not be necessary. At the late date at which this report is being written (August 29), after many needless delays, a card reporting more than 8,000 tons of molding sand has been received, which necessitates changes in the tables. Such tardiness is one of the causes of delay in the publication of this report.

WAR USES.

The utility of sand and gravel has only to be mentioned to be appreciated, but to most people the great variety of their uses is unknown and their connection with war is unrecognized. Of course the largest quantity of sand produced in this country is that used by builders. Although the building operations in the large cities of the country were much less in 1917 than in 1916, in some localities there was an amazing increase in building. Among these large building operations may be mentioned cantonments, shipyards, and towns engaged in the manufacture of munitions and other war necessities. Sand and gravel are used in these structures, from the concrete piles and foundations placed in the ground to the mortar in the chimneys that rise above the gravel roofs. Other war-time uses of sand and gravel are mentioned in the following paragraphs.

Molding sand is used for casting molten metal and is of many kinds. There are three main classes – steel, iron, and brass molding sands. Each class includes several

varieties of sand, the particular variety used depending on the size and weight of the casting and the position occupied in the mold. It is easily seen how important these sands are in war time, when a nation is making great quantities of machinery and munitions requiring castings in all these metals. Sand is used for molding such diverse things as shrapnel and the bodies of gasoline engines, cannon and car wheels, and for making many other things intimately connected with the prosecution of war.

Steel-molding sand is a white or yellowish clean quartz sand high in silica. It has no bond, and in order to make a mold with it a small quantity of fire clay, molasses water, or other material is added for binder. The size of the sand grain varies with the work to be done. Iron-molding sand or foundry sand is siliceous sandy material used in foundries for making molds and cores for casting molten iron. It is usually of some shade of brown, may be clayey, loamy, or sandy, fine or coarse grained, and has strong bond when moist. From 3,000,000 to 5,000,000 tons is used annually. Brass-molding sand includes sand used for molding brass, bronze, and aluminum. This is a very fine grained sand with strong bond which will take sharp detailed impressions and give a smooth surface to the casting. Articles for war use cast in these metals are numerous.

The manufacture of glass might at first thought be considered a nonessential industry with relation to war, but no sooner did this Nation enter the conflict than there was found to be a shortage of optical glass for range finders, field glasses, cameras, and surveying instruments. The making of optical glass was undertaken by the Government in cooperation with existing glassworks. The sand required for this work is small in quantity but

important. How many people who are dependent on eyeglasses for clear vision are aware that sand is the principal component of the lenses? Sand composes 60 to 75 per cent of all glass, and more than 2,000,000 tons of glass sand was used in the United States in 1916. Glass is used in war for many purposes, ranging from plate glass for portholes and companionways on transport and battleships to cheap green-glass insulators for electric-transmission lines, from lenses in periscopes to electric-light bulbs and clinical thermometers. Fortunately for our large need, the supply of glass sand of all grades is abundant, and methods of making glass for optical use as well as for other purposes are now well understood.

Grinding, polishing, and blast sands have a part in the conduct of war in making smooth the rough places on metal, glass, stone, and other hard substances. Blast sand is clean tough sized sand, with either round or angular grains, which is driven by compressed air through a hose for such purposes as cleaning metal castings and dressing stone. In gun shops, locomotive and car shops, and most places where heavy metal castings are made the sand blast is used to clean off parts of the mold that adhere to the castings. The size of sand used is varied with the character of the duty to be performed.

Fire or furnace sand is highly refractory silica sand for lining furnaces and ladles used to contain molten metal and so has a place in all foundries. About 500,000 tons is used annually in the United States.

Military highways and railroads are built, ballasted, and repaired with sand and gravel. Many millions of tons of sand and gravel are used on the roads and railroads of this country, and readily available supplies of this material

enable the roads to support the heavy traffic in war time. Sand is carried on all locomotives to increase the friction on slippery rails and so plays a not unimportant part in transportation. Engine or friction sand reported annually as used in the United States amounts to about 1,230,000 tons. It must be dry and for best service should be fairly even grained, tough, and sharp.

Filter sand and gravel are fairly pure quartz free from dirt, dust, organic matter, or other impurities, sized, and containing not more than a very small percentage of soluble minerals. They are used for beds in water-filtration plants and in filters for other liquids. As the used sand does not wear out or deteriorate, practically all the demand, which is not large, is for new filters rather than for renewal. Water for some of our military camps passes through sand filters.

There are many other uses of sand, some closely and others more remotely connected with the activities on the battle front. Sand in bags is used for protecting buildings and works of art in cities under gun fire and for balloon ballast. Fine, clean sand is employed in the care of pigeons and canaries used as messengers and gas detectors in the trenches, and sand bags form the parapets of many lines of defense.

TRADE CONDITIONS.

Many sand and gravel producers in all parts of the country report that trade was much better in the first half of 1917 than in the second half. The entry of the United States into the world war in April, 1917, and the consequent temporary unstable business conditions, followed by Government restrictions of shipping, resulted in a decreased

production in sands for some uses, especially for buildings and roads, toward the end of the year. The scarcity and cost of labor and coal and the shortage of freight cars seriously impeded the production of sand. The larger producers in several of the Eastern States agree that the demand was the greatest ever experienced, but the sales were restricted by the above-mentioned conditions.

A tabulation of 736 reports from producers in six leading States shows that of this number 353, or 48 per cent, considered business conditions better in 1917 than in 1916, 24 per cent saw no change, and 28 per cent handled less material. In Ohio and Pennsylvania the trade was especially brisk.

PRODUCTION.

In 1917 the total quantity of sand and gravel produced was 76,119,325 short tons, valued at $35,296,932, as compared with 89,091,732 tons in 1916, valued at $29,809,995.

The tables for 1917 have been prepared by Mrs. L. M. Beach, statistical clerk, from reports received from about 2,300 producers throughout the United States.

[Tables omitted:]

* * *

GLASS SAND.

GENERAL ASPECTS OF THE INDUSTRY.

Although the quantity of glass sand produced in the United States passed the 2,000,000-ton mark in 1916, it fell below that mark in 1917. The production was greater, however, than in any year previous to 1916. The value of

the total output, on the other hand, increased largely, exceeding $2,500,000, although in no previous year had it reached $2,000,000. The average price per ton in the last seven years has ranged from $0.85 to $1.06, but in 1917 it rose to $1.38, owing to the increased cost of labor, machinery, and fuel.

The principal producers of glass sand in order of output are Illinois, Pennsylvania, West Virginia, Ohio, Missouri, and New Jersey.

Glass sand produced in the United States, 1910-1917.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	1,461,089	$1,516,711	$1.04
1911	1,538,666	1,543,733	1.01
1912	1,465,386	1,430,471	.97
1913	1,791,800	1,895,991	1.06
1914	1,619,649	1,568,030	.97
1915	1,884,044	1,606,640	.85
1916	2,018,317	1,957,797	.97
1917	1,942,675	2,685,014	1.38

GLASS-SAND LOCALITIES.

The resources of the United States in sand suitable for making the more common kinds of glass are very great. Twenty States produced glass sand in 1916, and it occurs in other States in numerous localities.

Localities where glass sand was reported as produced in 1917.

Arkansas: Ruddells.
California: Ione and Lake Majella.
Georgia: Lumber City.
Illinois: Millington, Oregon, and Ottawa.
Indiana: Michigan City.
Iowa: Clayton.
Kentucky: Olive Hill.
Louisiana: Opelousas.
Maryland: Robinson.
Massachusetts: Cheshire.
Missouri: Crystal City, Klondike, Pacific, and Silica.
New Jersey: Cedarville, Millville, Penbryn, South Vineland, and Williamstown Junction.
New York: Cleveland.
Ohio: Austintown, Barberton, Howard, Massillon, New Lexington, Silica, and Toboso.
Oklahoma: Hickory, Oklahoma City, and Roff.
Pennsylvania: Daguscahonda, Derry, Dunbar, Falls Creek, Kennerdell, Lewistown, Mapleton, Ridgeway, St. Marys, Torpedo, and Vineyard.
Tennessee: Lagrange.
Texas: Santa Anna.
Virginia: Sandberg.
West Virginia: Berkeley Springs, Buckhannon, Independence, Sturgisson, Terra Alta (Holmes Station), and West Berkeley.

MOLDING SAND.

The molding-sand industry has reached such volume that the decrease of 1,681 tons from the production of 1916, as shown in the following table, is negligible. This small quantity may be covered by the failure of one producer to report, or it may be silica sand reported as foundry sand

which might have been credited either to steel-molding sand or to furnace sand. The great increase in total value and in the average price per ton from 69 cents to 92 cents, or 33 per cent, is notable.

Molding sand produced in the United States, 1910-1917.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	3,636,167	$2,431,254	$0.67
1911	3,376,717	2,132,469	.63
1912	4,485,380	2,718,726	.61
1913	3,563,583	2,230,217	.63
1914	2,751,209	1,756,383	.64
1915	3,585,746	2,123,203	.59
1916	4,662,649	3,219,839	.69
1917	4,660,968	4,303,809	.92

Ohio was the leading State in the production of molding sand, as in 1916. Pennsylvania, however, dropped from second to fourth place, Illinois becoming second and New York third in order of production.

BUILDING SAND.

The recorded production of building sand in 1917 was 25,374,987 short tons, valued at $9,837,688, a decrease of 1,818,475 tons in quantity and an increase of $1,268,013 in value. It is presumed that there will be a greater decrease in production of building sand in 1918 because of the restrictions on building throughout the country.

Although there is a very large increase in the production of sand and gravel for building in some localities, particularly at isolated places where large Government construction work is in progress, it is believed that this will not counterbalance the decrease through the country as a whole. It is freely predicted that after the war there will be a great deal of building and that the production of sand and gravel for this purpose will materially increase.

New York led in the production of building sand in 1917, with an output of more than 3,800,000 tons; Illinois was second, with 2,500,000 tons; and Ohio and Pennsylvania ranked third and fourth.

GRINDING AND POLISHING SAND.

The total production of grinding, polishing, and blast sand in 1917 was 1,179,190 tons, or only a little less than in 1916. There was, however, a very considerable increase in value, the total amount being $1,220,708, as compared with $889,651 in 1916. The average price per ton for all sands under this head was 65 cents in 1916 and $1.04 in 1917. Pennsylvania, Illinois, New Jersey, and New York were the leading producers in the order named.

FIRE OR FURNACE SAND.

The total production of fire or furnace sand in 1917 was 604,035 tons, valued at $695,455, as compared with 426,654 tons, valued at $384,738, in 1916. Pennsylvania, Ohio, New Jersey, and Illinois were the largest producers. The average price per ton was 34 cents in 1915, 90 cents in 1916, and $1.15 in 1917.

OTHER SANDS.

There was a slight increase in the quantity of engine sand reported, and a large increase in value, caused by an increase in average price from 37 cents in 1916 to 59 cents in 1917. Pennsylvania reported by far the largest production, or more than three times that of Illinois, which ranked second. Paving sand showed an increase in both quantity and value and would have been reported in larger quantity had not the use of freight cars for transporting sand and gravel been restricted in the later part of the year. Filter sand, reported separately for the first time in 1916, fell off in 1917, the production being 62,170 tons, valued at $47,351, as compared with 76,053 tons, valued at $68,340, in 1916. There was a small reduction in both quantity and value of railroad ballast reported to the Survey, and a reduction of about 7,000,000 tons in quantity of gravel produced for all purposes, but the total value of gravel produced was more than $1,300,000 greater than in 1916.

CHATS AND CHERTS.

The tables of production given above do not include a considerable quantity of chats or tailings from the Missouri zinc mines. This waste product, which is used on roads, has a nominal value equal to the cost of loading. The shipments of chats in 1917, as reported by the Missouri Bureau of Geology and Mines, amounted to 1,426,716 short tons, compared with 2,890,970 tons in 1916. Of these shipments in 1917, 1,055,972 tons were from mines in southwestern Missouri and 370,744 tons from mines in southeastern Missouri. More than 1,000,000 tons of this material is believed to have been used for

railroad ballast, and the rest for other purposes, such as road metal and concrete.

Neither do the tables include between 13,000 and 20,000 tons of chert dug in Alabama and valued at more than $11,000.

IMPORTS.

Sand valued at $142,586 was imported into the United States in 1917, as compared with imports valued at $87,144 in 1916. This is largely building sand brought to the United States from Canada as a near source of supply or brought as ballast from overseas. The imports usually include a small quantity of French molding sand used for making fine bronze castings, refractory sand from England for lining certain iron furnaces, and sands adapted to special uses and brought in small quantity. This importation of sand from abroad is for the most part nonessential but is done because molders, foundrymen, or others of foreign birth learned their trade with a foreign sand and are averse to using other sands than those with which they are familiar.

EXPORTS.

In 1916 for the first time the value of the exports of sand and gravel were recorded separately by the Bureau of Foreign and Domestic Commerce. The table given herewith has been prepared by J. A. Dorsey, of the Survey, from the tables published by that bureau. No information is at hand as to the quantity of sand and gravel represented by these figures nor as to the character and use of the material. Building sand went to Canada from the Great Lakes and Canadian boundary rivers as a convenient

source; the character of the material sent to other countries is not known to the writer.

Value of sand and gravel exported from the United States in 1916-17.

Destination.	1916	1917
Denmark	$300	.....
Spain	420	.....
England	775	$7,136
Canada	196,001	415,699
Panama	8,190	33,941
Mexico	7,011	16,892
Newfoundland	1,943	1,039
Cuba	1,519	1,743
Argentina	600	6
Brazil	1,029	226
China	428	217
Japan	2,554	5,951
Other countries	12,540	11,401
	233,310	494,251

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

DEPARTMENT OF THE INTERIOR
ALBERT B. FALL, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1918

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PART II – NONMETALS

R. W. STONE, Geologists in Charge

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

SAND AND GRAVEL

By R. W. STONE.

INTRODUCTION.

The task of the Geological Survey in collecting the statistics of the production of sand and gravel in the United States has proved very difficult. The small dealers not infrequently are reluctant to give the quantity and value of their output, and many of the new producers do not realize the purpose of the Survey's work. This reluctance to furnish complete or satisfactory information is often due to the desire of the producer to keep all knowledge of his business from his competitors. He does not realize that the statistics of any particular individual or firm are held in strict confidence by the Survey and are not given out except by his special permission. The small independent producer should use every legitimate effort to foster his own enterprise, especially when he is surrounded by competitors, but it is to his interest that he and his business be known to the Survey, which may be able to turn more business his way.

In all statistical work the completed totals can be no better than the individual reports. If a man or a firm here and there fails to give the figures showing production and value, or makes erroneous statements, the accuracy of the tabulated statistics is to that extent impaired.

The work done by the United States Geological Survey in connection with sand and gravel is not confined to the tabulation and publication of the statistics of production. Information concerning these products is constantly being

sought and compiled and is freely given to any inquirer. An engineer in New York may want a grade of sand that is especially fitted for some particular work there or elsewhere and may ask what source of supply is nearest to his project. The Survey promptly puts him in touch with the firm or firms that can best supply him sand in the quantity and of the quality he desires. A builder who is far from any source of gravel known to him and who wants to save both time and freight charges in obtaining his supply of gravel asks the Survey for information; or someone forwards to the Survey a sample of sand to learn its use and value and its possible buyers. The Survey tries to help each inquirer, thus benefiting both the producers and the consumers.

PRODUCTION.

Reports received by the United States Geological Survey from 2,800 producers show that 61,824,426 short tons (of 2,000 pounds) of sand and gravel were produced in 1918. However, the production in 1918 was 14,894,899 tons less than in 1917, when it was 76,419,325 tons. Nevertheless, the average price per ton in 1918 was 61 cents, or 33 per cent more than the average, 46 cents, received the year before, so that notwithstanding a heavily decreased output the value of the production in 1918 was $37,927,079, as compared with $35,296,932 in 1917, an increase of $2,630,147.

The producers found business better during the first half of the year, but after July 1, 1918, there was a pronounced decline in the volume of business. The date of this change coincides closely with the date when freight rates were increased. General Order No. 28 of the United States

Railroad Administration, providing for an increase of 25 per cent on practically all commodities, went into effect June 25, 1918. The freight rates on sand and gravel were increased 1 cent for each 100 pounds, or 20 cents a ton, equal to about $6 or $7 a carload. An increase of this kind might not affect products of the higher grades, but it would and did affect those of the lower grades, which sell at the lowest prices.

For a closer insight into the business of 1918 as compared with that of 1917 the opinions of 634 producers of sand and gravel, representing the six States Michigan, Pennsylvania, New York, Illinois, Indiana, and Ohio, are summarized. Of these, 169, or 27 per cent, reported that their trade was better; 153, or 24 per cent, said that trade was about the same; and 312, or 49 per cent, indicated disappointment. Most dealers in glass and foundry sand were in the first category, and a few producers of paving sand were pleased, but nearly all of these were located where highways were under construction or being improved. Most of the 312 disappointed once seemed to be producers of building and paving materials.

To meet the exigencies of war the entire output of some sand and gravel concerns was commandeered by the Government, and the operators accepted their fate with the same splendid spirit that was shown by other business men who also wanted to "do their bit" loyally.

The tables which follow have been prepared by Mrs. L. M. Beach, who also assisted in the preparation of the text.

[Tables omitted.]

* * *

IMPORTS.

There was no record of the quantity of sand imported into the United States between January and June, 1918, although the value is said to have been $44,555; but the imports during the last half of the year amounted to 284,036 short tons, valued at $46,910, an average price of 16½ cents a short ton. The total value of the imports was therefore $91,465 in 1918, as compared with $142,586 in 1917.

The word "imported" is somewhat misleading as regards most of the sand covered by these figures, because some of it was carried as ship's ballast and much of it was building sand brought in from Canada to localities near the border. The importation of some special grades of molding sand, such as the French sand for making fine bronze castings and of refractory sands from England for lining certain iron furnaces, is due to the difficulty of making our foreign-born molders and foundrymen believe that the foreign sands with which they are familiar are no better than the American product.

EXPORTS.

No distinct record of the exports of sand and gravel was kept until 1916. In that year the Bureau of Foreign and Domestic Commerce prepared a table showing such exports, which, however, gave value only, not quantity and kind. The exports of sand have been negligible until recently, but there seems to have been a fair gain in 1918 in spite of the shortage of shipping.

The largest quantity of sand and gravel exported was that sent to Canada for use as building material. No

information is at hand as to the kinds of sand and gravel sent to the other countries named in the following table:

Value of sand and gravel exported from the United States in 1917-1918.

Destination.	1917.	1918.
Canada	$ 415,699	$ 599,876
Mexico	16,892	3,741
Panama	33,941	2,721
Japan	5,951	2,674
England	7,136	2,300
Cuba	1,743	1,788
Newfoundland	1,039	930
Brazil	226	393
China	217	132
Argentina	6	----------
Other countries	11,401	4,859
	494,251	619,414

GLASS SAND.

PRODUCTION.

A total of 2,172,887 short tons of glass sand was produced in the United States in 1918, an increase of 12 per cent over the output in 1917, which was 1,942,675 short tons. The average price in 1918 was $1.94 a ton, an increase of 40 per cent over price in 1917, which was $1.38 a ton. These figures seem especially encouraging to the producers when it is further stated that the total value was $4,209,728 in 1918, as compared with $2,685,014 in 1917, an increase of $1,524,714, or 57 per cent:

Examination of the accompanying table showing the production of glass sand in the six principal producing States in 1917 and 1918 is interesting. In 1917 Illinois,

Pennsylvania, West Virginia, Missouri, New Jersey, and Ohio produced 94 per cent of the entire output of glass sand in the United States, and in 1918 the same States produced 93 per cent. New Jersey had the largest increase in price per ton, 80 cents; Pennsylvania gained 76 cents; West Virginia 73 cents; the inland States – Ohio, Missouri, and Illinois gained 41,39 and 36 cents, respectively. This difference in increased valuation is mainly attributable to freight differentials, for if the freight charges to a given point differ the producer who has the longer haul must lower his price in order to compete with the dealer who has the shorter haul.

The cost of production varies according to the method used. Most of the glass sand produced in Illinois, for example, is obtained by hydraulic mining; most of that produced in Pennsylvania and West Virginia is quarried and crushed. Pennsylvania, West Virginia, and Ohio, in the order named, have the largest number of glass factories,[1] because they have cheap and abundant natural gas for fuel. The producers of glass sand in Illinois and Missouri must sell their product at a low initial price to compete with producers in the other States named.

[1] The glass industry, report on the cost of production of glass in the United States, U.S. Dept. Commerce Misc. Ser. 90, 430 pp., 1917. Sold by the Superintendent of Documents, Government Printing Office, Washington, D. C., price 35 cents.

Glass sand produced in six leading States in 1917-1918.

State.	1917.		
	Quantity (short tons).	Value.	Average price per short ton.
Illinois	607,186	$679,618	$1.12
Pennsylvania	462,972	742,815	1.60
West Virginia	347,640	562,693	1.62
Missouri	153,970	162,838	1.05
New Jersey	100,448	93,194	.93
Ohio	161,408	276,619	1.72

State.	1918.		
	Quantity (short tons).	Value.	Average price per short ton.
Illinois	760,835	$1,273,804	$1.67
Pennsylvania	450,880	1,065,162	2.36
West Virginia	399,936	942,331	2.35
Missouri	141,062	202,763	1.44
New Jersey	139,992	242,762	1.73
Ohio	130,359	277,475	2.13

Glass sand produced in the United States, 1910-1918.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	1,461,089	$1,516,711	$1.04
1911	1,538,666	1,543,733	1.01
1912	1,465,386	1,430,471	.97
1913	1,791,800	1,895,991	1.06
1914	1,619,649	1,568,030	.97
1915	1,884,044	1,606,640	.85
1916	2,018,317	1,957,797	.97
1917	1,942,675	2,685,014	1.38
1918	2,172,887	4,209,728	1.94

GLASS-SAND LOCALITIES.

The resources of the United States in sand suitable for making the more common kinds of glass are very great. Twenty States produced glass sand in 1918, and it occurs in other States in numerous localities.

Localities where glass sand was reported as produced in 1918.

Arkansas: Ruddells.
California: Ione and Lake Majella.
Georgia: Lumber City.
Illinois: Millington, Oregon, and Ottawa.
Indiana: Michigan City.
Iowa: Clayton.
Kentucky: Olive Hill.
Louisiana: Opelousas.
Maryland: Robinson.
Massachusetts: Cheshire.
Missouri: Crystal City, Klondike, Pacific, and Silica.
New Jersey: Cedarville, Millville, Pembryn, South Vineland, and Williamstown Junction.
New York: Cleveland.
Ohio: Austintown, Howard, Massillon, New Lexington, Silica, and Toboso.
Oklahoma: Hickory and Roff.
Pennsylvania: Daguscahonda, Derry, Dunbar, Falls Creek, Kennerdell, Lewistown, Mapleton, Ridgway, St. Marys, Torpedo, and Vineyard.
Tennessee: Legrange.
Texas: Santa Anna.
Virginia: Mendota.
West Virginia: Berkeley Springs, Buckhannon, Independence, Sturgisson, Terra Alta (Holmes Station), and West Berkeley.

BUILDING SAND.

The output of building sand in 1918 amounted to 19,686,885 short tons, valued at $9,772,556. In 1917 the output was 5,688,102 tons more. In money value the production of 1917 exceeded that of 1918 by $65,132. The decrease in quantity was 22 per cent; the decrease in value was less than 1 per cent.

The Government used a considerable quantity of building sand at numerous army cantonments and also built a large number of more or less temporary offices for its war activities in the city of Washington, as well as large manufacturing plants at other points, in the construction of which large quantities of sand and gravel were used.

In consequence of the restrictions placed upon building for other than Government or war industrial uses, there was a decided decrease in the commercial use of building materials of all kinds. To meet the natural increased demands alone a vast amount of building should have been done in 1918. When normal conditions return the industry will doubtless show great activity.

More building sand was produced in the State of New York in 1918 than any other State, but its total output was very little more than half that of 1917. The output of nearly all the States declined, that of New Jersey alone most closely approaching its output in 1917.

The six leading States in the production of building sand in 1918 were New York, Illinois, New Jersey, Ohio, Pennsylvania, and Indiana, in the order named. These six States produced 50 per cent of the output of the country. There was a general though irregular increase in value,

with Pennsylvania in the lead. Pennsylvania received an average of 33 cents a ton more than in 1917, whereas the price in Ohio advanced only 15 cents and in New York, where the greatest quantity was used, the price advanced only 4 cents.

Building sand produced in six leading States in 1917-18.

State.	1917		
	Quantity (short tons).	Value.	Average price per ton.
New York	3,836,257	$975,512	$0.25
Illinois.....	2,592,774	932,455	.36
New Jersey.....	1,818,275	545,437	.30
Ohio.....	2,318,904	1,090,689	.47
Pennsylvania...	1,996,524	1,319,624	.66
Indiana.....	1,556,922	410,988	.26

State.	1918		
	Quantity (short tons).	Value.	Average price per ton.
New York	1,997,091	$581,835	$0.29
Illinois.....	1,832,195	756,888	.41
New Jersey.....	1,748,576	690,209	.39
Ohio.....	1,722,737	1,062,108	.62
Pennsylvania...	1,537,984	1,529,133	.99
Indiana.....	1,061,189	308,461	.29

MOLDING SAND.

During 1918 the steel mills of the country were busy on war orders and a large number of foundries of metals were working at top speed. For this probably more than for any other reason there was a good demand for molding sand. There was an increase of 5 per cent in the production of sand of this class over that of 1917, and the price

per ton received averaged 13 per cent higher. The output was 4,910,178 short tons, valued at $5,121,865, as compared with 4,660,968 tons, valued at $4,303,809, in 1917.

Molding sand produced in the United States, 1910-1918.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	3,636,167	$2,431,254	$0.67
1911	3,376,717	2,132,469	.63
1912	4,485,380	2,718,726	.61
1913	3,563,583	2,230,217	.63
1914	2,751,209	1,756,383	.64
1915	3,585,746	2,123,203	.59
1916	4,662,649	3,219,839	.69
1917	4,660,968	4,303,809	.92
1918	4,910,178	5,121,865	1.04

The output of six States which produced 85 per cent of all the domestic molding sand dug in 1918 is given in the following table:

Molding sand produced in six leading States in 1917-18.

State.	1917		
	Quantity (short tons).	Value.	Average price per ton.
Pennsylvania..	640,450	$696,734	$1.09
Illinois	703,208	412,626	.59
Ohio	999,974	1,218,217	1.22
New York	650,427	808,550	1.24
New Jersey	611,916	651,279	1.06
Indiana	287,483	111,732	.39

State.	1918		
	Quantity (short tons).	Value.	Average price per ton.
Pennsylvania..	1,158,715	$953,886	$0.82
Illinois	885,617	658,205	.74
Ohio	857,481	1,493,541	1.74
New York	519,681	770,512	1.48
New Jersey	442,007	626,637	1.42
Indiana	298,934	135,605	.45

FILTER SAND.

Filter sand is clean silica sand in sorted sizes, used for beds in water-filtration plants and in small mechanical filters. A city water supply taken from a stream which may be polluted by organic matter or at times heavily charged with sediment is purified by passing it through a sand filter. As silica is insoluble in water, good filter sand, once installed, may be used a long time. In 1918 the output was 51,111 short tons, valued at $74,977, an average price of $1.47 a ton, as compared with 62,170 short tons, valued at $47,351, or .76 cents a ton, in 1917. This was an increase of 58 per cent in value of output and of 93 per cent in average price per ton.

RAILROAD BALLAST.

There was a considerable decrease in the use of sand and gravel for railroad ballast in 1918, although the value increased, in sympathy with prices in general, from 17 to 22 cents a short ton. This material is produced mainly by the users. The railroads that dig out their own ballast are requested by the Survey to give not only the quantity of their output, but its value, based upon market quotations. Certain producing railroads, however, have reported the

actual cost of the work of production as the value of the ballast, so that the Survey's estimate of value per short ton of output is more likely to be under than over the market value.

OTHER SANDS.

Sands produced for other uses than those already mentioned are inconsiderable in volume yet are of considerable value, and are tabulated as "Other sands."

The man in the street might regard as a joke the statement that sand is used as an ingredient of some fertilizers; nevertheless, in 1918 New York and Pennsylvania reported that 31,110 short tons of sand, valued at $22,360, was used as filler for fertilizer.

Sand is used as bedding for stock cars. Indiana and Iowa sold 6,339 short tons, valued at $1,602, for this purpose. Shippers of livestock may well compare the cost of other forms of bedding with that of sand at the present average cost of only 25 cents a short ton.

A few tons of fine-grained high-grade silica sand is sold annually for use by blacksmiths in welding iron and soft steel. Sand for this purpose is put up in 25-pound sacks and so brings a high price per ton. Likewise, high-grade silica sand, because of its whiteness, is sold in 3 and 5 pound cartons for use in mechanical toys and thus retails at about $60 a ton.

Producers in New York State chronicle the fact that a considerable quantity of sand known as "grits" found ready sale to poultry raisers.

A few hundred tons of clean, even-grained, and high-grade silica sand from Ottawa, Ill., is sold annually in small individual lots for use as a standard in physical tests of other sands. When a testing laboratory determines the strength of a sand as a component of cement, for example, a test of Ottawa sand is made at the same time under similar conditions for comparison. Such a testing sand must be procurable with absolute uniformity of physical characteristics through a long period of years. Ottawa sand meets the requirements and is widely used for this purpose.

CALCULATION OF WEIGHTS, MEASURES, AND VALUES.

The unit used in this report for quantities of sand and gravel is the short ton 2,000 pounds, but many dealers use the cubic yard in their computations and have been so reporting their outputs. Some standard of relation between the two units, however, is necessary, for without such a standard a producer who sells his output by the cubic yard might be getting less for his sand than a competitor who sells by the short ton. Several years ago the Geological Survey asked a large number of producers of sand and gravel to furnish estimates of the average weight of a cubic yard of sand. Some of these dealers made actual tests of the weight of a cubic yard of the sand they sold. The reports show that a cubic yard of sand weighs from 2,000 to 4,000 pounds, the variation being due to differences in mineral composition, moisture content, and packing. The gravels averaged more than the sands, the maximum being 4,200 and the minimum 2,200 pounds. An average of all the weights reported was found, and the result was that a cubic yard of sand is now regarded as

weighing 2,665 pounds and a cubic yard of gravel as weighing 2,820 pounds.

In response to repeated requests from new producers as to the method of converting yards to tons a few examples are here worked out. A producer of molding sand, let us assume, got out 500 cubic yards during the year. To find the number of short tons he produced, he should multiply 500 by 2,665, which will give his output in pounds, and should then divide the product – 1,332,500 – by 2,000 to get the short tons. He would find that he had produced 666¼ short tons.

Possibly this same man sold his sand for $1.35 a cubic yard and is still wondering whether his price equaled that received by his competing neighbor who charged $1.04 a short ton. The competitor received $1.04 for 2,000 pounds of his molding sand. Multiplying 2,665 (the average weight of a cubic yard) by $1.04 and dividing the product by 2,000 gives $1.38½, which is the price the competitor received for an average cubic yard of sand, or 3½ cents more than the man who sold at $1.35 a cubic yard. It happens that $1.04 was the average price per short ton received for molding sand in 1918, and as this is about $1.38½ a cubic yard, some of the readers of this report may discover that they have received more or less than this average through difference in the method they used in selling.

A short method of reducing long tons to short tons is as follows: A long ton contains 2,240 pounds and is therefore 1.12 times as heavy as a short ton. A convenient rule to find the number of short tons is thus to multiply the number of long tons by 1.12.

The quantity of sand in any number of cubic yards may be reduced to weight in short tons by a similar

method. It is, however, necessary that the weight in pounds per cubic yard be known. This, of course, varies in different pits. For sand weighing an average of 2,800 pounds a cubic yard, for example, divide 2,800 by 2,000, which gives 1.4; multiply this quotient by the number of cubic yards, and the product will be the number of short tons. The rule in this case would be: To find the number of short tons divide the weight in pounds of 1 cubic yard by 2,000 and multiply the quotient by the number of cubic yards.

CHATS AND CHERT.

The tables of production given above do not include a considerable quantity of chats or tailings from the Missouri zinc mines. This waste product, which is used on roads, has a nominal value equal to the cost of loading. The shipments of chats in 1918, as reported by the Missouri Bureau of Geology and Mines, amounted to 902,129 short tons, compared with 1,426,716 tons in 1917. Of these shipments in 1917, 1,055,972 tons were from mines in southwestern Missouri and 370,744 tons from mines in southeastern Missouri. More than 1,000,000 tons of this material is believed to have been used for railroad ballast, and the rest for other purposes, such as road metal and concrete.

Neither do the tables include more than 40,000 tons of chert dug in Alabama and valued at more than $17,000.

[Attached to Defendants' Brief in Support of Mineral Ownership and in Opposition to Plaintiffs' Motion for Summary Judgment (Dist. Ct. Docket No. 26)]

DEPARTMENT OF THE INTERIOR
ALBERT B. FALL, Secretary

UNITED STATES GEOLOGICAL SURVEY
GEORGE OTIS SMITH, Director

MINERAL RESOURCES

OF THE

UNITED STATES

1919

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PART II – NONMETALS

R. W. STONE, Geologist in Charge

[SEAL]

WASHINGTON
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1922

SAND AND GRAVEL

By R. W. STONE.

PRODUCTION.

The sand and gravel produced in the United States in 1919, according to reports received by the United States Geological Survey from producers, amounted to 70,576,407 short tons, an increase of 8,751,981 tons, or 14 per cent, over the production in 1918. The quantity of glass sand, molding sand, and fire sand was less than in 1918, and the quantity of grinding, engine, and filter sand was practically the same in both years; building sand and paving sand, however, were in greater demand in 1919 than in 1918, and, with railroad ballast and gravel, they account for practically all the increase.

The total value of all the sand and gravel produced in 1919 was $45,951,556, as compared with $37,927,079 in 1918.

The following table summarizes the sand and gravel industry for the last five years. It shows at a glance the quantity of material, so far as reported to the United States Geological Survey, that has been transported each year. There is no way to tell how much has been moved by wagon or auto-truck and how much by railroad. It is worthy of note, however, that nearly 1½ million tons annually is used on rails to increase traction. The importance of this sand, listed as engine sand and used both above and below ground on steam and electric railways for hauling passengers and freight is little appreciated. There is no equally cheap substitute, and without this sand many a train would be unable to move.

Sand and gravel produced in the United States, 1915-1919, by kinds, in short tons.

Kind.	1915	1916
Glass sand	1,881,044	2,018,317
Molding sand	3,585,746	4,662,649
Building sand	22,921,426	27,193,462
Grinding and polishing sand	969,718	1,370,354
Fire or furnace sand	529,887	426,654
Engine sand	1,560,201	1,383,034
Paving sand	3,381,717	3,998,548
Filter sand	(a)	76,053
Other sands	1,109,250	1,834,907
Railroad ballast	2,688,766	13,649,827
Gravel	37,972,548	32,477,927
Total	76,603,303	89,091,732

Kind.	1917	1918	1919
Glass sand	1,942,675	2,172,887	1,827,409
Molding sand	4,660,968	4,910,178	3,774,612
Building sand	25,374,987	19,686,885	21,969,736
Grinding and polishing sand	1,179,190	975,265	988,240
Fire or furnace sand	604,035	472,733	355,458
Engine sand	1,410,222	1,462,465	1,481,481
Paving sand	4,348,474	2,722,144	4,431,306
Filter sand	62,170	51,111	58,342
Other sands	1,262,785	666,152	1,083,152
Railroad ballast	10,260,999	8,064,505	8,715,842
Gravel	25,312,820	20,640,101	25,890,829
Total	76,419,325	61,824,426	70,576,407

a Filter sand included "Other sands" prior to 1916.

The demand for sand and gravel was heavier in the latter part of 1919 than in the first half of the year, but car shortage and labor shortage curtailed the output. The opinions of 610 out of an approximate total of 1,200 producers in the five leading States – Illinois, Michigan, New York, Ohio, and Pennsylvania – give some insight into the trend of business. Of these producers 42 per cent reported that their trade was better, 26 per cent said that trade was about the same, and 32 per cent said that they had less business. In New York and Pennsylvania the number of producers who reported trade better and worse was the same, and those in the two States who reported no change were about 20 per cent of those who expressed an opinion. As a matter of fact, the quantity of sand and gravel produced in New York was a little less and the value a little greater in 1919 than in 1918, and in Pennsylvania there was a decrease in both quantity and value.

It must be admitted that the statistics of the sand and gravel industry are incomplete, for there are many small producers whose names are not known to the Geological Survey. This will always be the case, because there are thousands of unrecorded small building operations in the villages and hamlets and on the farms of every State the sand and gravel for which are procured locally and not furnished by a regular dealer. The aggregate quantity of the material so produced must be large. The list of producers maintained by the Geological Survey is always increasing, however, and a small percentage of the output reported each year is always that of producers whose output had not previously been recorded. Therefore as the list of producers increases the statistics each year more nearly represent the actual output of the industry.

The tables in this report have been prepared by Mrs. L. M. Beach, of the United States Geological Survey.

[Tables omitted.]

* * *

IMPORTS.

The quantity of sand imported and entered for consumption in the United States in 1919 was 597,481 short tons, valued at $126,586, or 21 cents a ton. The total value of the imports in 1918 was $91,465 and in 1917 was $142,586. There is no record of the quantity of sand imported into the United States during the first half of 1918, but the imports during the last half of the year amounted to 284,036 short tons, valued at $46,910, an average price of 16½ cents a ton. Some of the sand imported was carried as ship's ballast and was entered at various ocean ports, but most of it was building sand brought in from Canada to localities near the border. For instance, Sandusky, Ohio, gets sand from Pelee Island, which is across the international boundary in Lake Erie.

EXPORTS.

The exports of sand and gravel have been negligible until recently. The largest quantity exported is that sent to Canada for use as building material. No information is at hand as to the kinds of sand sent to the other countries named in the following table. Much of it doubtless is building sand carried as ballast.

Value of sand and gravel exported from the United States in 1917-1919.

Destination.	1917	1918	1919
Canada	$415,699	$599,876	$347,578
Mexico	16,892	3,741	14,803
Panama	33,941	2,721	4,650
Japan	5,951	2,674	3,091
England	7,136	2,300	967
Cuba	1,743	1,788	2,438
Newfoundland	1,039	930	279
Brazil	226	393	40
China	217	132	130
Argentina	6	----------	712
Other countries	11,401	4,859	7,382
	494,251	619,414	382,070

PRICES.

The average price per ton of all sand and gravel reported sold in the United States in 1919 increased from 61 to 65 cents. There was not, however, a general increase in prices, as the average prices of some kinds of sand decreased.

Average prices per short ton of sand and gravel marketed in the United States, 1915-1919.

Kind.	1915	1916
Glass sand	$0.85	$0.97
Molding sand	.59	.69
Building sand	.30	.32
Grinding and polishing sand	.46	.65
Fire, or furnace, sand	.34	.90
Engine sand	.32	.37
Paving sand	.32	.36

Filter sand	(a)	.90
Railroad ballast	.13	.13
Gravel	.25	.32
All kinds	.30	.33

Kind.	1917	1918	1919
Glass sand	$1.38	$1.94	$1.97
Molding sand	.92	1.04	1.10
Building sand	.39	.50	.56
Grinding and polishing sand	1.04	1.60	1.34
Fire, or furnace, sand	1.15	1.48	1.23
Engine sand	.59	.76	.77
Paving sand	.41	.54	.66
Filter sand	.76	1.47	1.48
Railroad ballast	.17	.22	.30
Gravel	.46	.57	.66
All kinds	.46	.61	.65

a Figures not available.

The prices given in this table for each use were obtained by dividing the total value of the sand sold by the total number of tons sold. High-grade glass sand in certain localities brought $2.50 to $3 in 1919, but large quantities of low-grade silica sand used for making colored glass bottles and other cheap glass were dug from sand dunes by steam shovel and sold for less than 50 cents a ton; thus the average price was brought down to less than $2 a ton. Although building sand sold in some of the large eastern cities in 1919 around $1 to $2 a ton, this was exceptional, and sand for building purposes throughout most of the country, except in large cities, was sold for about 50 cents a ton.

The average price of most of the different sands listed in the table has either doubled or a little more than

doubled in the last five years. The average price of grinding and polishing sand has nearly trebled, and that of fire or furnace sand has much more than trebled.

GLASS SAND.

PRODUCTION.

A total of 1,827,409 short tons of glass sand was produced in the United States in 1919, a decrease of 16 per cent from the output in 1918. The average price in 1919 was $1.97 a ton, an increase of 3 cents over that of 1918. The total value of all glass sand produced in 1919 was $3,593,371, a loss of nearly 15 per cent as compared with 1918. The accompanying table, showing the production of glass sand in the six principal producing States in 1918 and 1919, brings out the fact that the quantity produced was less in 1919 in each of the States except West Virginia, which made a gain. West Virginia was the only one of the six States, however, in which the average price per ton was less in 1919. Pennsylvania, New Jersey, and Missouri made nominal gains in average price per ton; Illinois increased 22 cents and Ohio 28 cents.

The quantity of glass sand reported as produced in Indiana was about 8,000 tons more than the production in Ohio. The Indiana material, however, was mostly of low-grade (dune sand) and was produced and sold at small cost, and the figures can not well be used in comparison with those of the six leading States in the production of high-grade glass sand.

Glass sand produced in six of the leading States in 1918 and 1919.

State.	1918		
	Quantity (short tons).	Value.	Average price per ton.
Illinois	760,835	$1,273,804	$1.67
Missouri	141,062	202,763	1.44
New Jersey	139,992	242,762	1.73
Ohio	130,359	277,475	2.13
Pennsylvania	450,880	1,065,162	2.36
West Virginia	399,936	942,331	2.35

State.	1919		
	Quantity (short tons).	Value.	Average price per ton.
Illinois	521,286	$886,707	$1.70
Missouri	135,683	209,938	1.55
New Jersey	121,799	225,036	1.85
Ohio	79,580	191,565	2.41
Pennsylvania	325,810	797,068	2.45
West Virginia	407,918	933,863	2.29

Glass sand produced in the United States, 1910-1919.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910	1,461,089	$1,516,711	$1.04
1911	1,538,666	1,543,733	1.01
1912	1,465,386	1,430,471	.97
1913	1,791,800	1,895,991	1.06
1914	1,619,649	1,568,030	.97
1915	1,884,044	1,606,640	.85
1916	2,018,317	1,957,797	.97

1917	1,942,675	2,685,014	1.38
1918	2,172,887	4,209,728	1.94
1919	1,827,409	3,593,371	1.97

GLASS-SAND LOCALITIES.

The resources of the United States in sand suitable for making the more common kinds of glass are very great. Nineteen States produced glass sand in 1919, and it occurs in other States in numerous localities.

Localities where glass sand was reported as produced in 1919.

Arkansas: Guion.
California: Ione and Lake Majella.
Georgia: Lumber City.
Illinois: Millington, Oregon, Ottawa, Utica, and Wedron.
Indiana: Michigan City.
Kentucky: Lawton.
Louisiana: Le Blanc.
Maryland: Robinson.
Massachusetts: Cheshire.
Michigan: Rockwood
Missouri: Crystal City, Festus, Gray Summit, Klondike, and Pacific.
New Jersey: Cedarville, Millville, Pembryn, South River, South Vineland, and Williamstown Junction.
Ohio: Austintown, Barberton, Chalfants, Howard, Massillon, and Toboso.
Oklahoma: Hickory and Roff.
Pennsylvania: Derry, Dunbar, Falls Creek, Kennerdell, Lewistown, Mapleton, Newton Hamilton, Parrish, Ridgway, St. Marys, and Torpedo.
Tennessee: Legrange.
Texas: Santa Anna.

West Virginia: Berkeley Springs, Great Cacapon, Greer, Imperial, Sturgisson, Terra Alta (Holmes Station), Thayer, and West Berkeley.
Wisconsin: Ripon.

BUILDING SAND.

The output of building sand in 1919, so far as reported to the Geological Survey, amounted to 21,969,736 short tons, valued at $12,296,664, an increase of more than 2,000,000 tons and $2,500,000 over the output of 1918. The six leading States in the production of building sand in 1919 were Illinois, Ohio, New York, New Jersey, Pennsylvania, and Indiana, in the order named. In total value of output, however, Pennsylvania led, the average price per ton in that State being 85 cents, which was much higher than that in any of the other leading States. The table shows an increase in average price per ton in each State except Ohio and Pennsylvania.

Building sand produced in the six leading States in 1918 and 1919.

State.	1918		
	Quantity (short tons).	Value.	Average price per ton.
Illinois	1,832,195	$756,888	$0.41
Indiana	1,061,189	308,461	.29
New Jersey	1,748,576	690,209	.39
New York	1,997,091	581,835	.29
Ohio	1,722,737	1,062,108	.62
Pennsylvania	1,537,984	1,529,133	.99

State.	1919		
	Quantity (short tons).	Value.	Average price per ton.
Illinois	2,187,682	$1,027,452	$0.47
Indiana	1,093,836	434,085	.40
New Jersey	1,640,704	763,896	.47
New York	1,974,827	705,603	.36
Ohio	2,063,918	1,173,324	.57
Pennsylvania	1,517,957	1,289,827	.85

MOLDING SAND.

The quantity of molding sand produced in 1919 was about 1,100,000 tons less than in 1918, and the total value was nearly $1,000,000 less. The average price per ton, however, was higher than ever before, being $1.10. Some molding sand sold for well over $2 a ton, and the average price in Ohio was $1.65, but large quantities of sand were sold in Illinois and Indiana for very much less than $1 a ton. In fact, in Indiana particularly hundreds of thousands of tons of dune sand for steel molding were sold for much less than 50 cents a ton.

The very considerable reduction in quantity of molding sand produced in 1919 can doubtless be ascribed in part to the strike of the steel workers.

Molding sand produced in the six leading States in 1918 and 1919.

State.	1918		
	Quantity (short tons).	Value.	Average price per ton.
Illinois	885,617	$658,205	$0.74
Indiana	298,934	135,605	.45

New Jersey.....	442,007	626,637	1.42
New York.....	519,681	770,512	1.48
Ohio.....	867,481	1,493,541	1.74
Pennsylvania.....	1,158,715	953,886	.82

State.	1919		
	Quantity (short tons).	Value.	Average price per ton.
Illinois.....	482,219	$338,893	$0.70
Indiana.....	572,292	243,199	.42
New Jersey.....	501,583	583,656	1.16
New York.....	418,319	609,730	1.46
Ohio.....	689,555	1,137,356	1.65
Pennsylvania.....	512,862	712,460	1.39

Molding sand produced in the United States, 1910-1919.

Year.	Quantity (short tons).	Value.	Average price per ton.
1910.....	3,636,167	$2,431,254	$0.67
1911.....	3,376,717	2,132,469	.63
1912.....	4,485,380	2,718,726	.61
1913.....	3,563,583	2,230,217	.63
1914.....	2,751,209	1,756,383	.64
1915.....	3,585,746	2,123,203	.59
1916.....	4,662,649	3,219,839	.69
1917.....	4,660,968	4,303,809	.92
1918.....	4,910,178	5,121,865	1.04
1919.....	3,774,612	4,153,990	1.10

OTHER SANDS.

Sands sold for uses not specifically designated in the foregoing tables amounted in 1919 to 1,083,152 short tons, valued at $439,194. Most of this quantity – 509,107 tons,

valued at $128,445, or 25 cents a ton – was dune sand, dug along the shore of Lake Michigan in northern Indiana and used for filling, probably to fill swampy land or to grade around the great manufacturing plants along the lake shore.

Under this heading is included also sand sold for fertilizer filler, for bedding in stock cars, for use in mechanical toys, for use by blacksmiths in welding iron and soft steel, for testing sand for laboratory determinations, and for miscellaneous purposes. One producer reported a few tons sold as "propagating sand," by which is probably meant sand for use in greenhouses to start seedlings.

ASSOCIATIONS OF SAND AND GRAVEL PRODUCERS.

The organization of the sand and gravel producers in various parts of the country is progressing rapidly as the benefits of such action are recognized. The association of men engaged in any industry helps the advancement of that industry. Cooperation works for the common good. Mutual benefits are derived from getting together and understanding the other man's problems. Individuals can do little to protect their business from discriminatory regulations, but a solid association of producers united on a proposition can get results.

The National Association of Sand and Gravel Producers was organized in 1911 for the purpose of obtaining mutual benefits, including equitable rates from the railroads. An appreciation of the benefits procured by such organizations has resulted in the formation of several State and regional or local associations. The associations known to the Geological Survey are as follows:

American Sand Association (composed of producers of Silica and molding sand in eastern Ohio and western Pennsylvania), Pittsburgh, Pa.
Arkansas Valley Association of Mineral Aggregate Producers, Tulsa, Okla.
Chicago Sand & Gravel Producers' Association, 1406 City Hall Square Building, Chicago, Ill.
Georgia Sand & Gravel Producers' Association, Atlanta, Ga.
Great Lakes Sand & Gravel Producers' Association, Sandusky, Ohio.
Illinois Association of Sand & Gravel Producers, Lincoln, Ill.
Indiana Sand & Gravel Producers' Association, 122 East Ohio Street, Indianapolis, Ind.
Iowa Sand & Gravel Producers' Association, Des Moines, Iowa.
Missouri Valley Association of Mineral Aggregate Producers, 706 American Bank Building, Kansas City, Mo.
National Association of Sand & Gravel Producers, 702 City Trust Building, Indianapolis, Ind.
Nebraska Aggregates' Association, Omaha, Nebr.
Pennsylvania Sand & Gravel Producers' Association, 1101 Diamond Bank Building, Pittsburgh, Pa.
Silica Sand Association of Illinois, Central Life Building, Ottawa, Ill.
Wisconsin Mineral Aggregate Association, 382 First National Bank Building, Milwaukee, Wis.

TECHNICAL JOURNALS.

The technical journals that give considerable space to the sand and gravel industry are:

Cement, Mill, and Quarry, 542 Monadnock Block, Chicago, Ill.

Pit and Quarry, Rand-McNally Building, Chicago, Ill.
Rock Products, 542 South Dearborn Street, Chicago, Ill.

UNITED STATES DISTRICT COURT

District of Nevada

BEDROC LIMITED, L.L.C., a Nevada limited Liability Company, and EARL WILLIAMS, an individual,

Plaintiff/ Counterdefendants,

v.

THE UNITED STATES OF AMERICA; BRUCE BABBIT, Secretary of the Interior; UNITED STATES DEPT. OF THE INTERIOR; BUREAU OF LAND MANAGEMENT; and CURTIS L. TUCKER, Area Manager, Caliente Resource Area, Bureau of Land Management,

Defendants/ Counterclaimants.

JUDGMENT IN A CIVIL CASE

CV-S-98-01012-PMP (LRL)

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and this jury has rendered it's verdict.

_X_ Decision by Court. This action came to be considered by

the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiffs' Motion for Summary Judgment is DENIED. IT IS FURTHER ORDERED that Defendants' Brief in Support of Mineral Ownership and Opposition to Plaintiffs' Motion for Summary Judgment, requesting a judicial declaration finding the United States to be the owner of all valuable minerals underlying Bedroc's real property, including the sand and gravel deposits, is GRANTED.

JUDGMENT IS HEREBY ENTERED in favor of Defendants and against Plaintiffs.

May 25, 1999 — Date

LANCE S. WILSON — Clerk

Entered and Served May 25, 1999

/s/ — By Deputy Clerk

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

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No. 02-1593

IN THE
SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials) that were worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule that *all* sand and gravel were reserved on land patented by the federal government in the early 20th Century, whether congressional intent would be better served by a rule that such common materials were *not* reserved to the government as "valuable minerals."

RULE 29.6 STATEMENT

BedRoc Limited, LLC, is a Nevada limited liability company that has no parent corporation. No publicly held company owns a 10% or more equity interest in BedRoc Limited, LLC.

Western Elite, Inc., is a Nevada corporation. Western Elite has no parent corporation and no publicly held company holds 10% or more of Western Elite's stock.

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Other Authority

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Herbert T. Tiffany, *Real Property* § 977 (3d ed. 1975) 22

John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984) 38

IN THE

SUPREME COURT OF THE UNITED STATES

No. 02-1593

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Pet. App. A, 1a–21a) is reported at 314 F.3d 1080. The opinion of the District Court for the District of Nevada (Pet. App. B, 22a–38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (Pet. App. C, 39a–63a) is reported at 140 IBLA 295 (1997).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor granted an extension of time to file a petition to April 30,

2003. The petition was filed timely and this Court granted a writ of certiorari on September 30, 2003. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pittman Underground Water Act of 1919, 41 Stat. 293-95 (repealed 78 Stat. 389 (1964)) is set forth at Pet. App. D. (64a-68a), Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 90 Stat. 2744 (1976)), and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611, are set forth at Pet. App. E and F (69a-71a).

STATEMENT OF THE CASE

The BedRoc Patent

Enacted in 1919, the Pittman Underground Water Act (the "Pittman Act") was part of Congress' decades-long effort to encourage settlement and development of the American West. *See* 41 Stat. 293-95 (1919). Focusing on the state where, as a result of inadequate surface water, various homestead laws had been least successful in encouraging development, the Pittman Act authorized permits for individuals to explore for, and then develop, subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands ... in the State of Nevada." Pittman Act §1. Congress was concerned that after 50 years of land disposition under the mineral land laws, the homestead laws and other land grant laws, "[l]ess than 11 percent of the lands of the State ... [were] privately owned." H.R. Rep. No. 66-286, at 2 (1919). Congress accordingly sought to facilitate "the future development of Nevada...." *Id.* Water prospectors who found and developed an underground water source could obtain patents

for up to 640 acres of land. By its terms, a Pittman Act patent reserved to the United States "all the coal and other valuable minerals," which in turn would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." Pittman Act § 8.

Few prospectors rose to the formidable challenge of finding and developing underground water resources in the arid Nevada desert. As a result, the Pittman Act was widely viewed as a failure when it was repealed in 1964. *See* 78 Stat. 389. Some industrious souls, however, had succeeded in their efforts to discover and develop underground water sources – and thus obtained the benefit of the Pittman Act bargain. Newton and Mabel Butler succeeded in developing underground water and, as a result, secured a patent for 560 acres in Lincoln County, Nevada. JA 20-21. The United States Department of the Interior, U.S. Geological Survey ("USGS"), had designated their land as non-mineral and available for disposition in 1934. *Id.* 16-17. The Butlers were issued Patent No. 1107339 on March 12, 1940. *Id.* 20-21.

Common sand and gravel were abundant and visible on the Butlers' property and in the area generally when the Butler patent issued in 1940, but there was no market for such materials due to the remote location. *Id.* 10, 11. Expansion of the city of Las Vegas by the 1990s created a market for such materials, and the lessee of a successor owner began a sand and gravel operation. *Id.* 10; 314 F.3d 1080, 1083. In February 1993, Earl Williams purchased the property and continued extracting sand and gravel. 314 F.3d at 1083. Petitioner BedRoc Limited, LLC, ("BedRoc")

acquired the property in 1995, and has continued the sand and gravel extraction operation since that time. *Id.*

Sand and Gravel

Sand and gravel are among the most common materials on earth.[1] They result from the erosive forces of water, wind and ice on rock. In addition to being produced by natural forces, sand and gravel can also be produced by man, typically by crushing sandstone and other common rock found throughout the western United States.

The most common uses of sand and gravel are in construction and development activities. Sand and gravel may provide a base for structures and for pavement on a variety of road types from interstate highways to local mine and ranch roads. Sand and gravel are the principal ingredients in concrete and asphalt, used in a wide variety of construction applications.

Most sand and gravel is commercially useless, located too far from any market to be profitably exploited. Its value is situational: Location, location, location is key when it comes to creating some marketable use – and thus a value – for a sand or gravel deposit. Sand and gravel are bulky, heavy, common, low cost products, typically transported by railroad, or heavy gauge trucks, at substantial cost. Deposits therefore tend to be valuable only when located near markets

[1] Gravel is not a single substance with a fixed chemical composition. Rather, gravel has been defined as "a mixture of pebbles and broken fragments of rock mixed with finer materials such as sand and clay." *Miller Land & Mineral Co. v. State Highway. Comm'n*, 757 P.2d 1001, 1004 (Wyo. 1988) (citing 18A Words & Phrases 444 (1956) (meaning of "gravel").

in which the materials will be used – population centers, or sites for industrial development or road building.

Because their commercial utility is largely location-driven, sand and gravel abundant at a given location may be, and remain, worthless in perpetuity; or they may acquire some commercial importance if the forces of population and economic development bring "uses" to their location. The location of such deposits at an economically feasible distance may in turn facilitate the development of homes, communities, and industrial facilities.[2] In the absence of economically proximate construction and development, most sand and gravel is, and will remain, commercially useless.

Some additional data may add perspective on how the sand and gravel of the Nevada desert were regarded – or whether they was regarded at all – at the times relevant to this case. In 1918, shortly before the Pittman Act, Nevada production of sand and gravel was 25,325 short tons, valued at a mere $3,943 ($0.16/short ton). *Mineral Resources of the United States 1918, USGS, Part II – Nonmetals*, 307. In contrast, 1918 Nevada production of gold, silver, copper,

[2] This does not mean that all sand and gravel near commercial development will be exploited. The economics of sand and gravel extraction and sale are tight. Sand and gravel are common. One plot of land containing sand and gravel may well be opened with a gravel pit or extraction operation by some enterprising owner who chooses to use his land in that way. An adjacent property, with deposits in all respects equal, may be devoted to other uses –homes, roads and buildings. Even when, by reason of proximity to market, a deposit may have *potential* commercial value, rarely will the value be so great relative to other available uses that it would justify its use as a gravel source.

lead, and zinc had a total value of $48,528,124. *Id.*, *Part I – Metals*, 133A.

In sum, although sand and gravel were abundant on Pittman Act lands in the early to mid-20th Century, those substances were essentially worthless. Even the most enterprising settler could not have sold sand in the desert. Only expansion of Las Vegas and its suburbs, *decades after patent issuance*, created a possible market for sand and gravel on the Butlers' property and allowed extraction to begin.

Agency Determinations

On March 26, 1993, and April 1, 1993, the Bureau of Land Management ("BLM") issued notices of trespass to then-owner Earl Williams, claiming that sand and gravel on the former Butler property were reserved to the United States. JA 22-25, 26-28. Mr. Williams responded by letter on April 16, 1993, stating that "[t]his property is my own personal property and I do not feel that these are valuable minerals . . . ." Pet. App. 41a. BLM held to its view that it owned the sand and gravel. *Id.* In its April 1993 decision, the agency relied primarily on this Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), to support its decision that sand and gravel were reserved to the Government. *Id.*; JA 30. BLM found Williams in trespass under 43 C.F.R. § 9239.0-7, which provides:

> The extraction, severance, injury, or removal of . . . mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

Pet. App. 41a-42a; JA 30-31. BLM ordered Williams to cease sand and gravel removal immediately or face prosecution as a willful trespasser. JA 31. To continue operations pending final determination of sand and gravel ownership, BedRoc, and its predecessor, Earl Williams, entered into a series of increasingly detailed agreements with BLM in 1993, 1995, and 2001, pursuant to which they have made substantial payments, akin to royalties, into an escrow account. Ninth Circuit Supplemental Excerpts of Record ("SER") 103, 106-107 & Ninth Circuit Excerpts of Record ("ER") 85; 314 F.3d at 1083.[3]

BLM's ruling was appealed to the Interior Board of Land Appeals ("IBLA"), which affirmed the decision in October 1997. *Earl Williams*, 140 IBLA 295 (1997), Pet. App. 39a-63a. In so doing, the IBLA relied almost entirely

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[3] The 1993 agreement recited that BLM's actions and cessation order had imposed a "severe hardship" on Williams, his employees, and customers, preventing the fulfillment of contractual sales obligations. SER 102. Under the 1995 and 2001 agreements, BedRoc is prohibited from removing sand and gravel from any part of the property not analyzed for compliance with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). ER 84; SER 107. Under the 2001 agreement, BedRoc is required to supply BLM with monthly and yearly reports stating the amount of sand and gravel that has been removed. ER 89-90. BLM has the right to inspect BedRoc's books and records, and can require BedRoc to perform, at its own expense, property surveys if the BLM believes that BedRoc has removed more sand and gravel than reported. *Id.* 90. BedRoc is also required to pay BLM for sand and gravel, in minimum increments of 5,000 tons, in advance of removal from the property. *Id.* 89.

on legislative history of the Pittman Act, concluding that the reservation of sand and gravel to the Government was "consistent with the Congressional purpose" and "in accord with 'the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.'" Pet. App. 61a-62a (citing *Western Nuclear*, 462 U.S. at 59). The IBLA did not discuss the understanding of "valuable minerals" at the time of enactment, nor Mr. Williams' contention that the sand and gravel "on his land had no special value when the land was taken to patent, and was therefore not locatable under the 1872 mining laws at that time . . . ." *Id.* 45a.

District Court Proceedings

On July 2, 1998, BedRoc and Williams filed an action in the District Court for the District of Nevada seeking review of the IBLA decision and to quiet title to the sand and gravel. The United States counterclaimed, asserting ownership of "all" minerals underlying the property. ER 13. It demanded an accounting for all previously removed sand and gravel, as well as "silt and other common borrow." *Id.* 25 (¶73 & Prayer). Western Elite, Inc., which had acquired a portion of the property from BedRoc, later joined in the suit.

On cross-motions for summary judgment, the district court ruled that sand and gravel are "valuable minerals" reserved to the United States under the Pittman Act. 50 F. Supp. 2d 1001, 1008. Like the IBLA, the district court rejected the argument that "the sand and gravel deposits on the property were never reserved to the government, since they could not have been profitably mined and marketed in the 1940's." *Id.* at 1005. It likewise declined to apply the

plain language of the Act, finding that "it is best to examine the legislative history and purpose of the disputed statute to discern Congressional intent." *Id.* It found the remarks of Senator Pittman to be "authoritative" – and located a statement by him to the effect that Congress declined to permit "the acquisition of any character of minerals." *Id.* at 1006. Taking this statement as its cue – and without examining what Senator Pittman meant by "minerals" – the district court ruled for BLM. *Id.* at 1008.

The Ninth Circuit's Opinion

The Ninth Circuit affirmed. 314 F.3d at 1090. The court conceded that the "ordinary meaning of the phrase 'valuable mineral' does not evoke images of sand and gravel," but found that "neither does it obviously exclude those substances." *Id.* at 1084. It stated that while sand and gravel are not precious and thus not valuable in that sense, "valuable" can mean "useful." *Id.* In addition, because some parts of the Pittman Act contained the word minerals without the modifier "valuable," the court found that "the significance of the modifier 'valuable' diminishes." *Id.* It thus held that the phrase "valuable minerals" in the Pittman Act mineral reservation clause is ambiguous. *Id.* at 1085.

Turning to the statutory purpose and legislative history, the court noted that the stated purpose of the Pittman Act was to encourage the "exploration for and development of artesian and subsurface waters in the State of Nevada," but found that the larger purpose was to encourage agriculture. *Id.* Reviewing the legislative history of the Act, the Ninth Circuit concluded that Congress intended the Pittman Act mineral reservation "to serve the same purposes and have the same scope as the [mineral] reservation under the [Stock-Raising Homestead Act of 1916]" as defined by this Court in

Western Nuclear. *Id.* at 1086. The Ninth Circuit thus reasoned that "the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress' equally clear purpose to retain subsurface resources . . . for separate disposition and development." *Id.* (quoting *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279 (9th Cir. 1977)).

The Ninth Circuit rejected BedRoc's contention that ordinary sand and gravel could only be reserved as "valuable minerals" if the particular deposit had economic value sufficient to be deemed "mineral" subject to location under the mining laws at the time of the patent. *Id.* at 1089. Although only "valuable mineral deposits" are subject to development under the General Mining Act of 1872, 30 U.S.C. § 22 *et seq.*, the Ninth Circuit discerned a difference between a valuable *deposit* of minerals and valuable *minerals*. *Id.* This distinction led to the conclusion that sand and gravel are valuable minerals reserved under the Pittman Act even if the particular sand and gravel deposit at issue had (or presumably even if it still has) no economic value whatsoever.[4] *Id.* at 1089-90. Citing *Western Nuclear*, the Ninth Circuit ruled that the application of the reservation to a particular site does not require factual determinations regarding the value of the particular materials at issue on the site, but rather is "a straightforward legal one regarding

[4] The court reasoned that "valuable minerals" (in the mineral reservation) is broader than "valuable mineral deposits" (locatable under the mining laws) because substances like gold are "valuable minerals" even if found in deposits too small or inaccessible to profitably extract. *Id.* As described below, the Ninth Circuit's reasoning fails to reflect the historic distinction between common and inherently valuable minerals under the mining laws.

congressional intent as to the scope of the mineral reservation contained in the statute." *Id.* at 1090. Accordingly, the court concluded that although only deposits with value could have been located and developed under the mining laws, no such requirement limits the universe of materials reserved to the Government. *Id.*

This Court granted the petition for certiorari on September 30, 2003.

SUMMARY OF ARGUMENT

Common sand and gravel, worthless at the time of a Pittman Act patent, are not "valuable minerals" reserved to the United States by that Act. Ubiquitous, common, ordinary materials such as sand and gravel, lacking both intrinsic value and commercial worth, were not, at the time of the Pittman Act's passage – either in common understanding or under the mining laws – regarded as "valuable minerals." The cost of transporting sand and gravel, and the prevalence of such materials, renders most sand and gravel quite worthless. Thus, if such common materials are ever to be deemed "valuable," it is only when their proximity to market provides them with some commercial worth.

This understanding is consistent with the traditional views of the Department of the Interior – to which this Court has looked in construing similar mineral statutes. Interior historically has treated sand and gravel as either not locatable under the mining laws at all, or locatable only when a particular deposit has commercial worth. Moreover, when judging the commercial worth of gravel for purposes of a mineral reservation, Interior has looked to the value of the deposit at the time of the patent. Likewise, the rights of a

land patent holder on Pittman Act land must be determined by examining the commercial utility of the deposit at the time of the patent grant. For if ordinary sand and gravel ever fall within a reservation of "*valuable* minerals," they fall within that reservation only when they are in fact valuable at the time the patent is issued.

Watt v. Western Nuclear, 462 U.S. 36 (1983), which concerned a reservation of "all . . . minerals," is not to the contrary. The issue presented in this case – concerning the lack of value of the gravel at issue at the time of the patent – was never raised or decided in that case.

Moreover, to the extent that the interpretation of "all . . . minerals" in *Western Nuclear* is said to be authority for a blanket reservation of *all* sand and gravel *regardless* of their commercial value, then it is *Western Nuclear* that is off the mark. The Court's determination in that case that there was ambiguity about the treatment of sand and gravel under the mining laws in the era of the 1916 Stock-Raising Homestead Act and the 1919 Pittman Act arose from a failure to credit the contemporaneous decisions of the Department of the Interior explaining that common sand and gravel were not regarded as "minerals" under the public land and mining laws. To the extent that *Western Nuclear's* analysis is inconsistent with that understanding, it should be disapproved or overruled.

ARGUMENT

I. Common Sand And Gravel Are Not "Valuable Minerals" And, At Most, Could Be Reserved As "Valuable Minerals" Only If They Were Valuable At The Time Of The Patent.

Land patents issued under the Pittman Act reserved to the United States "all the coal and other valuable minerals" on the patented land. The question here is whether the reservation of "valuable minerals" encompasses ordinary sand and gravel on BedRoc's land. Such material is commonly found throughout Nevada, indeed through much of the United States. High transportation costs (and the sheer ubiquity of the material) make it unlikely that most sand and gravel will find any commercial use. As with most sand and gravel, the deposits on BedRoc's land were worthless at the time of patent. The Butlers received a patent for that land in 1940, but it was not until nearly half a century later – after decades of development and economic progress in the Nevada desert created a market for sand and gravel at this once-remote homestead – that BedRoc's sand and gravel became commercially useful and thus attained some monetary value. Because the scope of the property interest conveyed must be determined at the time of conveyance, the absence of value at the time of the patent is decisive: The common sand and gravel on BedRoc's land were not "valuable minerals" when the patent issued, and were therefore not reserved. Worthless common materials are not reserved as "valuable minerals" merely because such materials may eventually acquire some commercial worth.

A. In Ordinary Usage, Ubiquitous, Common, Worthless Materials Are Not Characterized As "Valuable Minerals."

It is highly unlikely that enterprising citizens such as Newton and Mabel Butler, considering whether to prospect for underground water in the hope of acquiring ownership of arid Nevada lands, would have understood the Government's reservation of "valuable minerals" to encompass the locally prevalent, commercially useless, and seemingly quite worthless, sand and gravel comprising much of their desert land. Even if the term "minerals" might reach common materials like sand and gravel (as this Court held in *Western Nuclear*, 462 U.S. at 60), the word "valuable" has a narrowing effect.[5] "Valuable minerals" would readily

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[5] The Ninth Circuit equated "valuable" with "useful," citing Joseph E. Worcester, *A Dictionary of the English Language* (1897). 314 F.3d at 1084. Yet, equating valuable with anything *potentially* useful – as did the Ninth Circuit – would render the term boundless. In any event, most contemporaneous dictionaries belie the Ninth Circuit's suggestion and instead define valuable in terms of monetary worth. *E.g.*, *Webster's New Int'l Dictionary of the English Language* 2264 (1916) (1. Susceptible of being measured or estimated as to value; appraisable. 2. Of financial or market value, esp. in considerable degree; commanding or worth a good price. 3. Of considerable worth in any respect; worthy; estimable; precious.); *The New Universal Dictionary* 533 (1901) (Having value or worth, especially high value; precious; estimable; worthy.); *The American Encyclopædic Dictionary* 4372 (Rev. ed. 1896); *A Standard Dictionary of the English Language* 1989 (1897); William Browne, *The Clarendon Dictionary* 308 (1898); *New American Standard School Dictionary* 387 (1906); *The New American Encyclopedic Dictionary* 4372 (1911); *The Comprehensive Standard Dictionary of the English Language* 645 (1915); *New Standard Dictionary of the English Language* 2629 (1919); *A Comprehensive Dictionary of the English Language* 554 (1920).

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encompass those substances with widely recognized intrinsic value, such as the metalliferous minerals (*e.g.*, gold, silver, and copper). "Valuable minerals" might arguably also cover other uncommon materials (such as marble or granite), recognized as being inherently valuable. But in ordinary parlance, a class of materials denominated "valuable minerals" will comprise only minerals that are usually valuable. Including materials that are usually worthless

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Some dictionaries referenced "valuable" as "useful *and* esteemed" or of "great . . . utility." *E.g.*, Noah Webster, *An American Dictionary of the English Language* 1460 (1889) (1. Having value or worth; possessing qualities which are useful and esteemed; precious. 2. Worthy; estimable; deserving esteem.); VIII *The Century Dictionary and Cyclopedia* 6690 (1906) (Capable of being valued; capable of having the value measured or estimated. 2. Of great value or price; having financial value or worth; representing a large market value. 3. Of great moral worth, utility, or importance; precious; worthy; estimable; deserving esteem.); *The American Dictionary and Cyclopedia* 2998 (1899); *Ogilvie's New Imperial Dictionary of the English Language* 1850 (1905-1906); *Clarkson's Standard American Dictionary of the English Language* 1850 (1908); *The American Universities New Unabridged Dictionary* 1850 (1916). A few suggested that "utility" might stand alone. *E.g.*, Joseph E. Worcester, *A Dictionary of the English Language* 1614 (1887) (1. Having value or worth; being possessed of worth or useful properties; of great price; precious; useful. 2. Deserving regard; worthy; estimable.); *The New Universities Dictionary* 740 (1922); *Collier's New Dictionary of the English Language* 883 (1917).

The prevailing definition, therefore, referred to financial worth, or "great" or an "esteemed" utility. The Ninth Circuit's expansive definition requires neither great utility nor even actual utility. That something might *potentially* be useful would render it "valuable" under the Ninth Circuit's view, even if were actually both useless and worthless.

within the class designated as "valuable minerals" strains ordinary usage.

Materials without intrinsic value or financial value are not typically described as "valuable." Likewise, materials that are common and ordinary, precisely because they are common and ordinary, are not typically regarded as "valuable." It is simply a matter of supply and demand.

"Valuable minerals" evokes riches lying beneath the surface (perhaps not yet discovered), not the very grit of the soil being conveyed. Indeed, a grantee of desert land littered with common gravel, sand, clay, or caliche[6] – materials that make planting, ranching, and inhabiting one's property more difficult – would likely have been shocked to learn that by using or removing such material he or she was trespassing upon the "valuable minerals" reserved to the Government.[7]

In sum, in conventional parlance, "valuable minerals" does not – and did not in 1919 – include materials that are usually worthless. If "valuable minerals" can ever include

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[6] Caliche is "gravel, sand, or desert debris cemented by porous calcium carbonate; also, the calcium carbonate itself." Am. Geol. Inst., *Dictionary of Geological Terms* at 70 (1983). *Accord* U.S. Dep't of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 165 (1968).

[7] Such common rock materials are often regarded as more burden than boon. This is not to say that occasional use may not be made of native gravel for a farm or ranch road or common clay for some building purpose. Indeed, the record shows that the Butlers found ways to employ native sand and gravel to make their patch of the desert habitable. They used sand and gravel from a sand wash for concrete block. JA 11. They also used those materials to build a concrete floor under an awning off the side of the house and to form pipe to bring water to their fields. *Id.* 11-12.

such materials, then it can do so only in those circumstances where the particular materials in question have actual value.

B. Common Sand And Gravel Were Not Regarded As Minerals Subject To The Mining Laws At the Time Of The Pittman Act And They Have *Never* Been So Regarded Where The Deposit At Issue Lacks Commercial Value.

The general understanding of "valuable minerals" discussed above is fully consistent with the contemporaneous *legal* understanding under the mining laws.

As this Court has emphasized, the *contemporaneous* understanding of a statutory term is the touchstone in determining what Congress intended by that term. *See Amoco Prod. v. S. Ute Indian Tribe*, 526 U.S. 865, 873 (1999). At the time of enactment of the Pittman Act, Interior had explicitly determined that sand, gravel, and other common materials were *not* to be regarded as "minerals" for purposes of the mining laws and mineral reservations absent some "peculiar property or characteristic giving them a special value." *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 312 (1910).[8] Interior applied this understanding of the status of such common materials in a wide variety of settings. *See, e.g.*, *Hughes v. State of Florida*, 42 Pub. Lands Dec. 401 (1913) (coquina – a shell rock – not a mineral

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[8] In *Zimmerman*, Interior rejected the contention that sand and gravel generally were "minerals" or that they should be regarded as mineral if their proximity to market rendered them commercially valuable. 39 Pub. Lands Dec. at 312-13. The value contended for the sand and gravel at issue in *Zimmerman* arose from their "proximity to the town of Conrad." *Id.* at 312.

under the general mining laws).[9] As shown below, Interior later (in 1929, long after passage of the Pittman Act) shifted its position to allow even ordinary sand and gravel to be classed as "mineral" under the mining laws. *See Layman v. Ellis*, 52 Pub. Lands Dec. 467 (1929). *But even then, such common materials were deemed to be "minerals" only when the deposit in question had existing commercial value arising from its proximity to market. See infra* at 23-25.

In general mining law parlance, "value" is central to determining which minerals are locatable (*i.e.*, subject to the establishment of a mining claim) and indeed to determining which materials are "mineral" at all. "Mineral" for purposes of mining law refers generally to those mineralogical substances that can be extracted from the earth and that have

[9] *See also Stanislaus Electric Power Co.*, 41 Pub. Lands Dec. 655 (1912) (granitic rocks suitable only for "rough work" were not locatable because such material was "widely distributed in eastern and northern California, comprising three-fifths of the area of the Sierra Nevadas"; distinguishing *N. Pac. Ry. v. Soderberg*, 188 U.S. 526 (1903), as involving granite building materials with special value); *Holman v. State of Utah*, 41 Pub. Lands Dec. 314 (1912) (common clay and limestone found not mineral where there were "vast deposits of each of these materials underlying great portions of the arable land in this country"; "In one sense, all land except portions of the top soil is mineral. The term, however, in the public land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance."); *King v. Bradford*, 31 Pub. Lands Dec. 108 (1901) ("Lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws."; such deposits were found in varying quantities ... throughout the Rocky Mountain region [and] "exist[] generally throughout the whole country").

independent value distinct from the surrounding earth. As one early court explained:

> . . . having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses.

Hendler v. Lehigh Valley R. Co., 58 A. 486, 487 (Pa. 1904) (finding common mixed sand that had utility, but no commercial value, was not "mineral"), *overruled on other grounds by Hall v. Delaware L. & W. R. Co.*, 113 A. 669, 670-71 (Pa. 1921). According to one leading authority (speaking contemporaneously with the Pittman Act): "The real test seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes . . . ." 1 Curtis H. Lindley, *American Law Relating to Mines and Mineral Lands*, § 93, at 156 (3d ed. 1914).

For this reason, the ability to lay claim to common materials under the mining laws has long turned on some peculiar quality of the material at issue or, later (after Interior's 1929 decision in *Layman*, *supra*), on the existence of a commercial market giving it economic value. Either way, common materials have been regarded as "minerals" for purposes of those laws only when the particular materials at issue have economic value where found.[10] Absent

[10] In *Western Nuclear*, the United States repeatedly pointed out that its view was that only commercially exploitable gravel fell within the scope of the reservation. Pet. Br., § II.A.2; *see also id.* at Heading

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commercial circumstances – such as proximity to market – that lend the common material a monetary significance, the material is not regarded as "mineral" and certainly not as a *valuable* mineral.

In this respect, common non-metallic substances are fundamentally different from intrinsically valuable minerals such as gold, and even from uncommon stones such as marble or granite, that are generally regarded as valuable. Once extracted or mined, the precious metals and other valuable minerals have sufficient value to be traded and sold virtually wherever they may be located. Gold that has been mined is, quite simply, gold. It is thus easily recognized as "valuable." But gravel that has been extracted is still just common rock. Because of their relative abundance in the earth, substances like sand and gravel, clay and caliche, have no recognized intrinsic value and attain "mineral" status in law only by virtue of *site-specific circumstances* or special features that give them value.

This emphasis on the actual site-specific value of common materials, but not intrinsically valuable materials, has long been reflected in public land law. For example, in *United States v. Coleman,* 390 U.S. 599, 600-03 (1968), this Court upheld Interior's determination that mining claims for quartzite stone – "one of the most common of all solid materials" – were invalid under the 1872 Mining Law where there was a "lack of an economically feasible market for the stone . . ." and there were "immense quantities of identical

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II: "The Explicit Terms Of The SRHA Show A Congressional Intent To Reserve Commercially Exploitable Deposits Of Gravel."

stone found in the area outside the claims . . . ." Interior determined that the "quartzite deposits did not qualify as valuable mineral deposits because the stone could not be marketed at a profit . . . ." *Id.* at 602. The Court upheld this "marketability test" even though it involved "a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals . . . ." *Id.* at 603. "While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is great demand sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit." *Id.*

In *Western Nuclear*, the Court addressed whether the reservation of "all . . . minerals" under the Stock-Raising Homestead Act of 1916 ("SRHA") reached ordinary gravel. This Court found guidance in the circumstances under which Interior had (*after* 1929) begun to consider gravel locatable under the mining laws. Gravel would be locatable by virtue of its having a commercial value in light of "existence of present demand" and "proximity to market":

> The treatment of *valuable deposits of gravel as mineral deposits locatable under the mining laws reflect [sic] an application of the "prudent-man test"* . . . . Under this test, which has been repeatedly approved by this Court, a deposit is locatable if it is "of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." . . . *In the case of nonmetalliferous substances such as gravel, the Secretary* [of the

> Interior] *has required proof that "by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.*"

462 U.S. at 58 n.18 (citations omitted) (emphasis added). Thus, this Court affirmed that gravel would be deemed a mineral under the mining laws where it had commercial utility in light of proximity to market and present demand.

C. Assuming That Sand And Gravel Ever Fall Within The Class of "Valuable Minerals," They Must At Least Have Commercial Value As Of The Time Of The Patent.

The value of common materials at any given site may change over time. Yet it is a fundamental tenet of property law that the scope of a conveyance must be determined in accordance with the intent of the parties at the time of the grant. *See City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 16 P.3d 915, 919 (Idaho 2000); *Red Hill Outing Club v. Hammond*, 722 A.2d 501, 504 (N.H. 1998); *Hare v. McClellan*, 662 A.2d 1242, 1249-50 (Conn. 1995), *Crockett v. McKenzie*, 867 P.2d 463, 465 (Okla. 1994); 4 Herbert T. Tiffany, *Real Property* § 977 (3d ed. 1975). *See also Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] *if it has the requisite value*. And there may be instances wherein a reservation of

minerals has been made in past years and wherein the requisite value was present and recognized to be so in the minds of the parties.") (concurring opinion).

Certainly Congress and patentees did not envision that ownership interests in the patented land might shift over time if worthless materials were later to become marketable. Such an approach would violate another fundamental principle of property law: an interest in property should be at all times both determinate and determinable. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . . ."). To hold that ownership of sand and gravel – which make up much of the land itself – should *not* be fixed at the time of the initial grant is to create a situation in which private property rights rise and fall with the local commodities markets.

Indeed, under this approach, the owner of the sand and gravel might lay the gravel on his or her own land or a nearby road bed, or provide it for the use of his or her neighbors, only to find, years later, that the gravel once freely extracted and generously distributed now belongs to the United States. The same might be true of other common materials on the site, including stones and clay – should a commercial market develop for such materials. There is no precedent in property law for such mutable ownership interests. Patentees of the Government are entitled, as are other grantees of real property, to determine what is theirs at the time of the conveyance.

Thus, it has long been the position of Interior itself that the status of common materials for purposes of a mineral reservation depends on the existence of a market for those

materials at the time of the conveyance. In a formal opinion issued in 1956, Interior's Solicitor declared that whether sand and gravel are subject to a mineral reservation in favor of the United States must be determined based on marketability at the time of the patent, not at some later date.[11] In interpreting a broadly-worded 1926 statutory mineral reservation of "timber, coal or other minerals including oil and gas or other natural deposits," the Solicitor concluded that common materials would be deemed reserved only if they had commercial marketability *at the time of the patent*:

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

Op. Solic. Interior Dep't M-36379, at Summary (1956) (emphasis added).

Consistent with the fact that common materials have long been treated differently than intrinsically valuable materials, the Solicitor was careful to point out that this rule linking the scope of a patent to nearness of a market at the time of the patent does *not* apply to the reservation of "other minerals having known *intrinsic mineral qualities and values*" such as gold or silver. *Id.* at 4 (emphasis added).

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[11] Interior confronted this issue only after reversing its earlier position (set forth in *Zimmerman*, 39 Pub. Lands Dec. at 312-13) that common sand and gravel were not "mineral" in character at all.

Rather, it governs the treatment only of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* Interior thus recognized that materials such as sand and gravel are fundamentally different from intrinsically valuable minerals in that they are deemed reserved "minerals" only if they have economic value at the time of conveyance. *Accord Miller Land*, 757 P.2d at 1007 (holding that "requisite value" of gravel must be determined as of the time of the reservation).

It is therefore fully consistent with common understandings, logic, and long-standing Interior policy – as well as fundamental principles of mineral and property law – to recognize that only economic value can elevate common materials to the status of "valuable minerals" under the reservation of a patent. Moreover, it is equally consistent with those common understandings, logic, and long-standing Interior precedent – as well as principles of mineral and property law – to recognize that unless such economic value exists at the time a patent is granted, these ordinary materials pass along with the remainder of the land to the grantee.

II. The Statutory Purpose And Legislative History Of The Pittman Act Support The Understanding That Sand And Gravel Without Commercial Value At The Time Of The Patent Were Not Reserved To The United States.

The Ninth Circuit based its interpretation of the reservation of "valuable minerals" under the Pittman Act squarely on the legislative history and perceived statutory purpose of that Act. The Ninth Circuit's analysis fails on many (and all) levels.

First, the Ninth Circuit's enthusiastic reliance on a perceived congressional purpose *not* apparent in the statutory text is contrary to this Court's precedents holding that persons induced to act by congressional promise ought to receive the benefit of the bargain. The Pittman Act was designed to induce private citizens to explore and develop the underground water resources of Nevada for the public good.[12] To those who succeeded, Congress promised substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1 (1919). Congress deliberately sought to induce reliance on the promise articulated in the statute. It cannot be presumed to have intended to deliver less than those words promised – as reasonably construed by the citizens being induced to act. As this Court has held, where Congress:

> . . . offers to individuals or to corporations as an inducement to undertake and accomplish . . . works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

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[12] Congress declared that "if the vast areas of arid lands in the State are to be developed, it must be done through the individual and with private capital." S. Rep. No. 64-4, at 2 (1915). *See also* H.R. Rep. No. 63-1418, at 3 (1915) (quoting Interior Secretary Lane's report that the "large surface areas, small population, and comparatively small amount of assessable property at present in the State, together with the limited number of wagon roads, railroads, and other transportation facilities, indicate strongly the need of further development in this direction . . . .").

Leo Sheep, 440 U.S. at 683. Therefore, the guiding principle in interpreting the reservation ought not be an *unexpressed* congressional purpose. Rather, as this Court has explained, in "interpreting statutory mineral reservations like the one at issue here . . . the terms of the reservation [are] to be understood in 'their ordinary and popular sense.'" *Amoco Production*, 526 U.S. at 873.

Even the Ninth Circuit appeared to concede that the better reading of "valuable minerals" would eliminate sand and gravel from the reach of the Pittman Act reservation. 314 F.3d at 1084. The court declined to acknowledge, however, that the *words* of the statute should govern where those words have prompted citizens to act.

Second, the Ninth Circuit's effort to equate this Court's *Western Nuclear* analysis of the purpose of the SRHA with the purpose of the Pittman Act reflects an imperfect match. As the Ninth Circuit recognized, the Pittman Act was designed "to encourage the exploration for and development of artesian and subsurface waters in the State of Nevada" by "creat[ing] an incentive for private individuals to risk time, labor, and money in prospecting for water." *Id.* at 1085. Thus, the patent was granted to successful water prospectors, in consideration of their investment of labor and capital in the discovery and development of underground water supplies. The patent was not granted for, as in the SRHA, improving the land by agriculture or ranching.

There is no doubt that Congress anticipated that agriculture would be the primary force for initial population entry into the Nevada desert. But the broader goal was to promote settlement and economic development generally, not a system of share-cropping, where the "owner" – who has devoted time, effort, and money to finding and

developing water – can be said to have received the entirety of his or her due if allowed merely to pursue an agricultural or ranching enterprise on the land. The Act does not grant a mere agricultural easement, but rather private ownership of property, with the aim of creating a citizenry invested in and responsible for the land and the community. The Pittman Act grants intrepid water prospectors a broad right of private ownership in all aspects of the land, subject only to a defined reservation in favor of the United States for "valuable minerals."[13]

Third, the Ninth Circuit reasoned that Congress divided the surface lands from the mineral estate so as to "facilitate development of both." *Id.* at 1086. The mechanism by which the mineral estate could be developed was through exploration and location of mining claims by private prospectors on the reserved mineral estate within the patented land. Pittman Act §8. At the time of the Pittman Act, however, sand and gravel were *not* – under Interior's view – locatable under the mining laws. *See Zimmerman*, 39 Pub. Lands Dec. at 312-13. Moreover, even after Interior revised its views in 1929 to allow sand and gravel to be located and acquired by mining claims, sand and gravel were *not* locatable unless the deposit at issue was commercially

[13] Significantly, there were those in Congress – including Senator Pittman himself – who believed that a person who successfully developed the water resources should be entitled to all the benefits of ownership, including *all* mineral rights. *See infra* at 29-30. Given this sentiment, any interpretation of the bargain struck within Congress ought at least allow for private ownership of the common materials that comprise much of the earth on the patented lands.

valuable. *See supra* at 23-25.[14] Thus, the sand and gravel on the Butlers' newly patented land were *not* subject to development via location under the mining laws, even under the most liberal interpretation of those laws. Construing the reservation to encompass common sand and gravel does *not*, therefore, encourage the public development of sand and gravel. Rather, as interpreted by the Government, it would only thwart such development by burdening the right of the *private* landowner to develop the resource.

Fourth, regardless of the purpose of the *grant*, the purpose of the *reservation* – to prevent fraudulent acquisition of valuable minerals – is not served by applying the reservation to common materials that were either apparent on the land or *not* valuable at the time of the patent.

In discerning the "intent" of the reservation, both the district court and the Ninth Circuit relied heavily on a colloquy between Senator Pittman of Nevada and Senator Thomas of Colorado. 314 F.3d at 1086-87 (citing 53 Cong. Rec. 705, 707 (1916)); 50 F. Supp. 2d at 1005-07 (same). Neither Senator favored any mineral reservation. Senator Thomas asked whether the reservation was "broad enough to include veins of gold, silver, lead, and other metalliferous deposits." 53 Cong. Rec. 707. Nothing in Senator Thomas' question suggests that he understood the reservation would reach common sand and gravel. Indeed, if the reservation

[14] In 1955, Congress removed "common varieties of sand, stone, gravel, pumice, pumicite or cinders" from the purview of the general mining laws. 30 U.S.C. § 611. This restored by legislation Interior's pre-1929 interpretation of the Mining Laws, as declared in *Zimmerman* and related cases.

included metalliferous deposits, Senator Thomas wished to amend the bill to eliminate it. *Id.*

Senator Pittman responded that he had prepared the bill without a mineral reservation because he opposed one, but that he had added the reservation to get the bill through the House of Representatives. *Id.* Under Sections 1 and 2 of the Pittman Act, the Secretary had to certify that the lands were nonmineral, meaning that their primary value was not as mineral land. But the House remained concerned that the Act could still "be used for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands." *Id.* Senator Pittman explained:

> If [minerals] are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the Government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of *coal or other valuable minerals* that are apparently *concealed under the surface*, but are known to the entryman.

Id. (emphasis added). The district court summarized these proceedings as a reflection of "Congressional hostility to fraudulent acquisitions of any mineral resources under the guise of agricultural land patents." 50 F. Supp. 2d at 1007.

There is absolutely no indication in the legislative history that such concern about fraudulent acquisition extended beyond intrinsically valuable substances (like gold) usually associated with such nefarious intent. But even if the concern about fraud might extend to common materials in some circumstances, the notion of "fraudulent intent" could not rationally reach sand and gravel that either (a) were

apparent on the surface of the land; or (b) were worthless at the time of the patent.

Fifth, the Ninth Circuit attributed much significance to what it saw as Senator Pittman's broad statement that it was the "policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry." 314 F.3d at 1087 (citing 53 Cong. Rec. 707). Yet that statement, and others like it, simply does not answer the questions presented here. As this Court pointed out in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 610-11 (1978), "mineral" (whether as used by a Senator, or as used in a statute) is an elastic word that potentially encompasses various meanings. In the sense that anything that is not animal or vegetable is mineral, the word has exceptional breadth; it is broad enough to cover a "high proportion of the substances of the earth" and to reach even "common dirt." *Id.* at 611 (citations omitted). But such broad definitions would be absurd if applied to grants of land under federal statute. *See N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903).

There is simply no way to discern what was in the mind of Senator Pittman when he used the word "minerals" or the phrase "any character of minerals" in a single floor statement. If anything, Senator Thomas' reference to metalliferous deposits being reserved to the United States, *combined with the absence of any suggestion in this legislative history that common materials were encompassed by the reservation*, suggests a narrow reach for the phrase. In the end, nothing in the debates suggests that any Member

intended to reserve common materials like ordinary sand and gravel to the United States.[15]

III. *Watt v. Western Nuclear* Is Consistent With The Understanding That Deposits of Sand And Gravel Without Commercial Value At The Time Of The Patent Are Not Reserved To The United States As "Valuable Minerals."

As support for its decision in this case, the Ninth Circuit relied heavily on this Court's decision in *Western Nuclear* applying the mineral reservation in the SRHA to gravel. For at least three reasons, *Western Nuclear* does not undermine the conclusion that to qualify as "valuable minerals" reserved by the Pittman Act, sand and gravel must have had economic value at the time of the patent.

First, the language of the reservation construed in *Western Nuclear* was different and broader. The reservation in *Western Nuclear* extended to "all the coal and other minerals." 462 U.S. at 37. A reservation of "all . . . minerals" allows for a far broader interpretation than a reservation limited to "valuable minerals." It is, of course, a basic rule of statutory construction that each word must be

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[15] The Ninth Circuit also asserted that the significance of the adjective "valuable" as used in the provisions of the Act defining the reservation was "diminished" because the Act in other places refers to "minerals" without that adjective. 314 F.3d at 1084. That argument makes no sense: the *reservation* refers to "valuable minerals." Other references to minerals in the Act without the adjective make sense in context and do not undermine the significance of the modifier *in connection with the reservation*. Similarly, the patent conveyance instrument from the United States Government to the Butlers on March 12, 1940, reserved only coal and other "valuable minerals." JA 21.

given significance. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). "Valuable" can only be a word of limitation.

Second, the structure and immediate purpose of the SRHA was somewhat different from the Pittman Act. The theory that the patentee has gotten the benefit of his bargain under the SRHA if he can use the land (including sand and gravel) for agricultural purposes, irrespective of the breadth of the mineral reservation, at least squares with the stated *immediate* purpose of the SRHA to encourage agricultural uses. It does not fit so comfortably, however, with the explicit purpose of the Pittman Act: to motivate citizens to prospect for underground sources of water and reward them for successfully doing so.

Third, in *Western Nuclear*, this Court simply did not consider the question presented here with respect to the time at which gravel must be valuable to fall within the reservation, *i.e.*, whether a statutory reservation of "minerals" encompasses *all* gravel, even if the gravel had no commercial value at the time of the patent. In *Western Nuclear*, the United States conceded that "the mineral reservation embraces only deposits of gravel and other mineral materials which are commercially exploitable and would justify a mineral entry." Pet. Br. § II.A.2. The landowner did *not*, however, contend that its gravel lacked commercial value at the time of the patent. Nothing in the Court's opinion or the briefing suggests a factual basis to make such an argument. The land at issue was patented in 1926 and was acquired by the respondent in 1975 for the purpose of extracting gravel from an "old gravel pit." 475 F. Supp. 654, 655 (D. Wyo. 1979). This Court quoted a BLM appraisal finding that gravel production was "the highest and best use of the property" and the IBLA's ruling that "gravel

in a valuable deposit is a mineral reserved to the United States . . . ." 462 U.S. at 40-41 (emphasis added).

In any event, the issue presented by the first question in the petition in this case was never raised in *Western Nuclear* and there is nothing in the opinion of the Court to suggest that the Court ever considered it. Because no one in the case raised the issue of *when* such common materials must be commercially exploitable – and because this Court did not address that issue – nothing in *Western Nuclear* dictates the answer to that question here.

At bottom, the Ninth Circuit misapprehended the scope of the *Western Nuclear* decision. *Western Nuclear* found "no indication that Congress intended the mineral reservation in the SRHA to be *narrower in scope than the mining laws*." *Id.* at 59 (emphasis added). *Western Nuclear* did *not* hold, however, that Congress intended the reservation to be *broader in scope* than those laws – which, even at their post-1929 broadest, would not have reached the sand and gravel on BedRoc's land. To the contrary, the Court's analysis links the scope of "minerals" subject to the mining laws *directly* to the scope of the mineral reservation.[16] Therefore,

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[16] The Court ruled that "minerals" reserved under the SRHA should include:

> . . . substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate.

462 U.S. at 53. The Court did not elaborate on the phrase "can be used for commercial purposes," except by reference to the general

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while certain of the Court's statements in *Western Nuclear* were expressed in rather broad terms, neither the Court's holding nor its reasoning supports the blanket reservation of *all* gravel to the Government – even gravel that has *never* been subject to the mining laws because it had *no market value* at any time prior to the 1955 complete withdrawal of such materials from the purview of those laws. *See supra* n.14.

IV. Common Sand And Gravel Were Never Reserved Under The Pittman Act Because They Were Not Regarded As "Minerals" At The Time Of The 1919 Pittman Act.

For the reasons described above, common, ubiquitous sand and gravel do not fall within any plausible construction of the phrase "valuable minerals." And even if they might be so classed when a particular deposit is, in fact, commercially marketable, they cannot be so classed for purposes of this case, when they had no economic value at the time of the patent. Even the broadest reach of the mineral laws would hold such common materials to be "mineral" only when, by reason of demand and proximity to market, those materials are commercially exploitable.

But there is a further impediment to the Government's argument that sand and gravel (as well as "silt and other common borrow," ER 25 (¶73 & Prayer)) were reserved to the United States under the Pittman Act. That impediment

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(continued) . . .

mining law concepts that link the location of common materials to an existing market for those materials.

lies in the fact that, *at the time of the Pittman Act*, it was firmly established that ordinary sand and gravel were not "minerals" at all under the general mineral laws – even if they had commercial value. *See, e.g., Zimmerman*, 39 Pub. Lands Dec. at 312-13; *Litch v. Scott*, 40 Pub. Lands Dec. 467 (1912); *Holman v. State of Utah*, 41 Pub. Lands Dec. 314 (1912); *Bettancourt v. Fitzgerald*, 40 Pub. Lands Dec. 620 (1912); *Gray Trust Co.*, 47 Pub. Lands Dec. 18 (1919). Indeed, under the well-settled, published decisions of Interior, such common materials were *not* subject to location and development under the general mining laws until Interior changed its interpretation of the term "mineral" in 1929, *after* the wave of Western land grant statutes, including the Pittman Act and the SRHA.[17]

This Court's decision in *Western Nuclear*, of course, suggested a possible contrary view of the early 20th Century American understanding of the term "mineral" as it relates to sand and gravel. That decision held that the term "minerals," as applied in connection with the mining laws circa 1916, could have encompassed common gravel and that this was Congress' intent in passing the 1916 SRHA. 462 U.S. at 60.

Western Nuclear has *not* proven to be a source of guidance to state and federal courts considering similar issues. Indeed, the decision stands in sharp contrast to the views of the majority of courts, before and since, addressing

[17] *Compare Zimmerman*, 39 Pub. Lands Dec. at 312 ("search of the standard American authorities . . . failed to disclose a single one which classifies a deposit such as claimed in this case as mineral"), *with Layman v. Ellis*, 52 Pub. Lands Dec. 714 (1929) (abandoning *per se* rule against mineral status for ordinary sand and gravel, in favor of case-by-case approach dependent on commercial utility).

the application of mineral reservations to sand and gravel in other contexts. The "vast majority of courts have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals." *Miller Land,* 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"). *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954);[18] *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (common limestone not reserved where government acquired surface estate from private party). Courts since *Western Nuclear* have generally distinguished its reasoning and declined to follow it in the context of private conveyances.

[18] *See also Roe v. State*, 710 P.2d 84 (N.M. 1985); *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *West Virginia Dept. of Highways v. Farmer*, 226 S.E.2d 717 (W. Va. 1976); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975); *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970); *Bambauer v. Menjoulet*, 214 Cal. App. 2d 871 (1963); *Fisher v. Keweenaw Land Ass'n*, 124 N.W.2d 784 (Mich. 1963); *Witherspoon v. Campbell*, 69 So.2d 384 (Miss. 1954); *Hendler, supra*; *see generally McDonald v. Snyder Constr. Co.*, 744 S.W.2d 550 (Mo. Ct. App. 1988) (collecting cases); 54 Am. Jur. 2d Mines & Minerals, § 8 (1971).

Courts have also distinguished *Western Nuclear* in cases involving lands patented under other *federal statutes*. The court in *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986), rejected, for example, Interior's argument that common caliche was a reserved mineral in land conveyed under the Taylor Grazing Act. The Tenth Circuit noted that "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]." 788 F.2d at 681. *See also United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands").

Western Nuclear's finding that common gravel was reserved to the Government under the SRHA is thus aberrational, promoting uncertainty and inequity in an area since dubbed the "tar baby" of natural resource law. *See* John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984). *See also Miller Land*, 757 P.2d at 1003-04 ("If there is any confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . ."). Even courts that have followed *Western Nuclear* (because SRHA lands were at issue) have expressed reluctance to impose such second-class status on surface owners of these lands. *See Champlin Petroleum Co. v. Lyman*, 708 P.2d 319, 321 (N.M. 1985) ("We, of course, must adopt the classification that the majority of the Supreme Court has accorded to the meaning of a federal act, even though we may share the reservations

of the dissenters that the majority's definition of a reserved mineral may be overly broad.").[19]

That *Western Nuclear* has not been followed by many courts dealing with similar issues is cause for question. Real property ownership is the stuff of common law, largely state law. Unless Congress has clearly ordained a different result, this Court may responsibly seek to harmonize the interpretation of federal statutes affecting property ownership with the construction of similar terms by the majority of state and federal courts. *See, e.g., Amoco Production*, 526 U.S. at 877 (citing Pennsylvania common law in interpretation of federal statutory mineral reservation).

The reluctance of many courts to follow *Western Nuclear* is understandable: that case rests on a clearly discernible error in its determination that at the time of passage of the SRHA it was not clear whether minerals, as understood under the mining laws, encompassed gravel. That error – regarding the contemporaneous understanding of the term "minerals" – significantly undermines the persuasive authority of the Court's conclusion and ought not be extended to this case, notwithstanding that the SRHA and

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[19] *But see Rosette Inc. v. United States*, 277 F.3d 1222 (10th Cir. 2002) (finding geothermal steam within SRHA reservation); *see also Hughes v. MWCA, Inc.*, 2001 U.S. App. LEXIS 13298 (10th Cir. June 14, 2001) (finding scoria within SRHA reservation). The rock type known as "scoria," at issue in *Hughes*, is a common cinder-like "crust on the surface of lava flows . . . ." Am. Geol. Inst., *Dictionary of Geological Terms* 450 (1983).

Pittman Act were passed in the same era.[20] Indeed, this Court should correct that error.

The Court recently confirmed the importance of fidelity to the prevailing understanding at the time a statute was passed. In *Amoco Production*, the Court overturned a Tenth Circuit ruling that the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") within coal formations. The Tenth Circuit had found the word "coal" to be ambiguous. *See* 526 U.S. at 871-72. This Court reversed because "the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource." *Id.* at 874. As the Court explained:

> The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."

Id. at 873 (citing *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914), and *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

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[20] If *Western Nuclear* had held that "all . . . minerals" under the SRHA did *not* encompass gravel, the Ninth Circuit could not plausibly have held that gravel was a "valuable mineral."

In 1910, Interior – the executive department charged with administering public lands – had clearly set forth its understanding about whether sand and gravel were minerals. According to the Department, "unless they possess a *peculiar property* or characteristic giving them a special value," common materials such as gravel "*were not to be regarded as mineral.*" *Zimmerman*, 39 Pub. Lands Dec. at 312 (emphasis added).

Zimmerman addressed whether a commercially valuable deposit of common gravel, marketable because of its proximity to a town, could constitute a "mineral" under the general mining laws. *Id.* Citing prior decisions involving common substances "valuable only for general building purposes," Interior concluded that:

> . . . the Department, *in the absence of specific legislation by Congress*, will refuse to classify as mineral land containing a deposit of material *not recognized by standard authorities as such*, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

Id. at 313 (emphasis added). Interior's decision in *Zimmerman* was based on a "search of the standard American authorities" that "failed to disclose a single one which classifies a deposit such as claimed in this case as mineral." *Id.* at 312. Interior was not "aware of any application to purchase such a deposit under the mining laws." *Id.*

Zimmerman was thereafter followed as *conclusive* that ordinary gravel was not "mineral" under the mining laws,

regardless of its commercial value. *See Litch v. Scott*, 40 Pub. Lands Dec. 467, 469 (1912). Its reasoning also was applied to other common materials. *E.g. Hughes v. State of Florida*, 42 Pub. Lands Dec. 401 (1913) (shell rock).[21]

This understanding of "mineral" was also reflected in *United States v. Aitken*, in which the court found that commercial gravel had "never been considered as a mineral." 25 Philippine Rep. 7, 16 (1913). According to the court:

> [If] an examination be made of the individual adjudicated cases and the decisions of the United States Land Department, upon which these general definitions of the term "mineral" are based, it will be found that *commercial gravel* was not a factor in forming them, and that it has *never been considered as a mineral.*

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[21] *See supra* note 9; *see also Victor Portland Cement v. S. Pac. Ry. Co.*, 43 Pub. Lands Dec. 325, 326 (1914) (ruling that "widely distributed" shale with clay "suitable for use in the manufacture of Portland cement" is not a "valuable mineral deposit" because it "does not materially differ ... from ordinary clay which is largely used for the same purpose...."); *Gray Trust Co.*, 47 Pub. Lands Dec. 18, 20 (1919) (ruling that the limestone deposits in question "have not been shown to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are shown to exist in immense quantities and more favorably situated with relation to transportation facilities, or otherwise to bring them within the category of mineral deposits subject to location under the mining laws," and that "the mere fact that a deposit is or may be used in the construction or surfacing of roads [does not] render land upon which it occurs mineral land..."). The same official who rendered this decision later reported favorably to the Senate on the bill that became the Pittman Act that year. *See* 58 Cong. Rec. 2268-69 (1919) (reprinting Acting Secretary Vogelsang's report with full text of bill). *See also* S. Rep. No. 66-66, at 2 (1919) (same).

Id. (emphasis added).[22]

In 1929, a decade after passage of the Pittman Act, Interior overruled *Zimmerman*, opting for a case-by-case approach recognizing sand and gravel deposits as "mineral" *if* they possessed value sufficient to justify mineral status under the traditional "prudent-man" test. *See Layman v. Ellis*, 52 Pub. Lands Dec. 714 (1929). In terms of common meaning in 1919, however, the decisions discussed above leave no doubt that "minerals" did not include sand and gravel, even if commercially valuable.

The majority's conclusion in *Western Nuclear* that *Zimmerman* ought not be regarded as decisive on the issue of Congress' contemporaneous understanding of "minerals" was misguided in several respects.

First, while acknowledging that "the legal understanding of a word prevailing at the time it is included in a statute is a *relevant* factor to consider in determining the meaning that the legislature ascribed to a word," 462 U.S. at 45-46 (emphasis added), the Court believed it "unlikely that many Members of Congress were aware of the ruling in *Zimmerman*." *Id.* But that analysis misstates the significance of a contemporaneous decision of the

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[22] This history is traced in *Western Nuclear's* dissent. After reviewing that history, the dissent found it "beyond question, when the SRHA was adopted in 1916 [and until 1929], that the Department had ruled consistently that gravel was not a mineral under the general mining laws." 462 U.S. at 65 (Powell, J., dissenting). Accordingly, "one must conclude that Congress intended the term 'minerals' in the new statute to have the meaning so recently and consistently given it by the Department in construing and applying the general mining laws." *Id.* at 66.

responsible federal department and the reasons why it is important, as reflected in cases before and since. The fact that *Zimmerman* was a decision of Interior, the department authorized by Congress to administer the statute (and which contributed directly to its drafting)[23] should have made the decision decisive – or nearly so. Because the decision represents the definitive, publicly stated view of the responsible government body, Congress' knowledge of the decision must be *presumed*. After all, *Zimmerman* was not an isolated Interior decision as noted; it was part of a long line of consistent rulings.

Traynor v. Turnage, 485 U.S. 535 (1988), decided five years after *Western Nuclear*, reflects the proper weight to be attributed to the governing agency's directives. The question in *Traynor* was whether the Rehabilitation Act barred

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[23] Interior was active in developing the Pittman Act legislation with the House and Senate Committees on Public Lands from 1915 through 1919. *See* H.R. Rep. No. 63-1418, at 2 (1915) ("The bill is approved and its passage strongly supported by the Secretary of the Interior . . . "; referencing a report from Interior Secretary Franklin Lane); S. Rep. No. 64-4, at 1 (1915) (referencing that the "bill is approved and its passage strongly supported by the Secretary of the Interior"). When Senator Pittman described the bill to the Senate, he explained that the Senate Committee on Public Lands "took the matter up with the Department of the Interior, and . . . the Department of the Interior favored this bill strongly with regard to the State of Nevada . . . ." 53 Cong. Rec. 705. *See also* S. Rep. No. 66-66, at 2 (1919) (noting that Interior "recommends that the bill be passed"); 58 Cong. Rec. 2268 (1919) (Senator Pittman explaining that the "Department of the Interior recommends the passage of the bill," which by then included a reservation of the "coal and other valuable mineral deposits in such lands"). *Accord* H.R. Rep. No. 66-286 (1919) (reprinting report from the Acting Interior Secretary to the Senate Committee on Public Lands).

characterization of alcoholism as "willful misconduct." Congress had amended 38 U.S.C. § 1662(a)(1) to allow veterans to take advantage of the G.I. Bill after the usual ten-year delimiting period if they could show they delayed going to school because of "a physical or mental disability which was not the result of [their] own willful misconduct." 485 U.S. at 545 (alteration in original). The Veterans' Administration ("VA") classified alcoholism as "willful misconduct" under § 1662, and this rule was challenged.

The Court sided with the VA. Because "[t]he same term had long been used in other veterans' benefits statutes," Congress was presumed to be aware that "[t]he [VA] had long construed the term 'willful misconduct' for purposes of these statutes as encompassing primary alcoholism…." *Id.* The Court explained:

> It is always appropriate to assume that our elected representatives, like other citizens, know the law. Hence, we must assume that Congress was aware of the [VA's] interpretation of "willful misconduct" at the time that it enacted §1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes.

Id. at 546 (citations omitted). *See also South Dakota v. Yankton Sioux*, 522 U.S. 329, 351 (1998) ("we assume that Congress is aware of existing law when it passes legislation" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). The same strong deference to contemporaneous pronouncements of the responsible federal agency is reflected in decisions preceding *Western Nuclear*. *E.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *N.L.R.B. v.*

Gullet Gin Co., 340 U.S. 361, 365 (1951); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210-11 (1827).

In sum, Congress is presumed to know the law set forth by the responsible agency. In declining to give *Zimmerman* its appropriate weight because *Members* of Congress might not have *actually* been aware of the decision, *Western Nuclear*'s analysis was inconsistent with both prior and subsequent cases.

Second, in addition to stating the *official* position of the responsible federal department, *Zimmerman* reflects the prevailing *American* legal usage on the issue. Interior's survey showed that "minerals" did not encompass gravel and that there was no contrary American authority. *Western Nuclear* erred in disregarding that contemporaneous prevailing American usage.

Third, the *Western Nuclear* majority suggested that Congress could have been aware of the Court's decision in *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526 (1903), which had adopted "a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." *Western Nuclear*, 462 U.S. at 46. But even assuming that it was appropriate to surmise about what Members of Congress *actually* knew (as a basis for disregarding statements by the responsible federal department), *Soderberg* provides an unlikely basis for raising doubts about the American understanding of the treatment of sand and gravel.

Soderberg involved a valuable granite formation, *not* sand and gravel. It considered whether a valuable *granite* deposit would render a particular property "mineral lands." In seeking guidance on the treatment of granite, the Court *first* looked to the way that the Lands Department (*i.e.*,

Interior) treated granite and like materials. Thus, *Soderberg* was, in its own analytical approach, consistent with giving great weight to the contemporaneous opinion of the executive department responsible for overseeing the grant. The Court looked for further confirmation in state court opinions holding that materials like iron, petroleum, and granite were regarded as minerals.

By way of final confirmation, the Court looked at English decisions, finding that English courts also regarded certain valuable building stones to be minerals in some circumstances. One of the quotations drawn from the English cases included gravel among a listing of building materials. Thus, even as quoted, the reference to "gravel" was merely passing dictum.[24]

The *Western Nuclear* majority found that the quotation of this English dictum in *Soderberg* could have been known

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[24] The question in *Midland Ry. Co. v. Checkley*, L.R. 4 Eq. 19 (1867), was whether certain stone was within a mineral reservation. The Master of Rolls held that it was and, in passing, commented that any useful subsurface material, including gravel, is mineral. As a reflection of English law, this dictum was never accepted as authoritative. In *Waring v. Foden*, 1 Ch. 276 (reprinted in 86 A.L.R. 969, 970 (1933)), the conveyance reserved "all mines, minerals and mineral substances . . . ." Considering this broad reservation in light of cases addressing both private and public conveyances (including *Checkley*), three judges agreed that sand and gravel were not reserved. *Id.* at 978, 981, 983. All three concluded that "minerals" connotes substances that are "exceptional," not "ordinary" or "common." *Id.* at 978, 979-80, 983. As one judge explained, "the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport." *Id.* at 980.

to Congress, and that it neutralized the clear, contrary, and more recent ruling of the responsible United States Government department. But in addressing a peculiarly American issue of contemporary legal usage, an English dictum, even if quoted in a 1903 case of this Court, cannot bear the weight that the majority of this Court placed upon it in 1983.

Given these difficulties with *Western Nuclear*'s analysis, the simple justice of the situation militates against *extending Western Nuclear*'s erroneous conclusion about Congress' understanding of the term mineral to this case. But consideration of the need for consistency in the law also suggests that the aims of *stare decisis* will not be disturbed if *Western Nuclear* is not merely limited to its facts, but disapproved or overruled. Although it is usually "more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), this is only true to the extent the "settled" law helps protect rights and expectations of citizens, *see Hubbard v. United States*, 514 U.S. 695, 714 (1995), fosters a cohesive body of jurisprudence, *see id.* at 711, and preserves the will of Congress, *see Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). Preserving *Western Nuclear's* misunderstanding of the word "mineral" would serve none of these aims.

Here, there will be no manifest injustice to private parties if *Western Nuclear* is overruled. Quite the opposite: private landowners will benefit from that ruling for it will restore the original intent and reflect the reasonable expectation of landowners to ownership of gravel on their fee simple estate. It will assuredly facilitate the exploitation

of common materials on such land. Furthermore, overruling *Western Nuclear* would not confuse mineral land law jurisprudence; such confusion was sowed by *Western Nuclear* itself. Finally, this is not an area in which overruling erroneous precedent would upset "careful, intense, and sustained congressional attention." *See id.* at 420, 424. Because the Pittman Act and the SRHA have been repealed, and because it is the Court's own decision that has created the existing confusion, the responsibility to take corrective action properly lies with the Court.

Although *stare decisis* "is of fundamental importance to the rule of law," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987), this Court has not applied the doctrine mechanically, *id.*; *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 695 (1978); *Boys Market, Inc. v. Retail Clerks Union, Local 770* 398 U.S. 235, 241 (1970); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Instead, the Court stresses that its precedents, even those involving statutory questions, are not sacrosanct. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

The Court has found "special justification" to reconsider and overrule a prior interpretation of a statute: (1) where such "stands as a significant departure" from prior cases, *see Boys Market*, 398 U.S. at 241; *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 501 n.3 (1982), (2) where such was based on a clear misunderstanding of the meaning of the statute, *see Patsy*, 457 U.S. at 501; *Monell*, 436 U.S. at 700, or (3) where the otherwise controlling precedent is "a positive detriment to coherence and consistency in the law." *See Patterson*, 491 U.S. at 173. *See also Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477,

484-85 (1989) (overruling precedent based on "seriously erroneous interpretation of statutory language"); *Monell*, 436 U.S. at 700-01 (misunderstanding of "Congress' view of the law" at the time of enactment constitutes another reason to overrule the precedent); *cf. Patsy*, 457 U.S. at 502-07. Moreover, this Court has considered the workability of a prior precedent as reflected in subsequent cases. *Continental T.V. Inc. v. GTE Sylvania, Inc.*., 433 U.S. 36, 47 (1977).

Although for the reasons described in this brief, *Western Nuclear* is not controlling in the construction of this different statute, coherence and consistency in the law would be well-served if this Court were specifically to disapprove or overrule that decision.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC, AND WESTERN ELITE, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals." Citing Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), the Ninth Circuit ruled that the Pittman Act reserved all sand and gravel as "valuable minerals," regardless of whether the materials at any given property had economic value at the time the land was patented. The questions presented are:

1. Whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were "valuable minerals" at the time of the patent.

2. Whether, if Watt v. Western Nuclear calls for the application of a per se rule regarding the reservation (or non-reservation) of common materials, congressional intent would be better served by a rule that common materials are not reserved to the government as "valuable minerals."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 314 F.3d 1080. The order of the district court (Pet. App. 22a-38a) is reported at 50 F. Supp. 2d 1001. The decision of the Interior Board of Land Appeals (Pet. App. 39a-63a) is reported at 140 I.B.L.A. 295.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 30, 2003, and the petition was filed on that date. The petition was granted on September 30, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Pittman Underground Water Act, ch. 77, 41 Stat. 293 (repealed by the Act of Aug. 11, 1964, Pub. L. No. 88-417, § 1, 78 Stat. 389) is reproduced at Pet. App. 64a-68a.

STATEMENT

1. a. During the nineteenth century, the federal government generally classified public land as either mineral or non-mineral, depending on whether it was more valuable for its mineral deposits or for agricultural use. The government then permitted acquisition of an entire tract under either the mining laws (in the case of mineral land) or the applicable land-grant statute (in the case of non-mineral land). See Watt v. Western Nuclear, Inc., 462 U.S. 36, 47-48 (1983); United States v. Sweet, 245 U.S. 563, 567-572 (1918). This system had significant disadvantages. As a result of fraudulent affidavits by entrymen -- and because of the difficulty, even in the absence of fraud, of determining whether land was more valuable for its minerals than for agricultural use -- land was frequently misclassified as non-mineral and conveyed under a land-grant statute, in which case the patentee received title to any subsequently discovered minerals. See Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 868-869 (1999); Western Nuclear, 462 U.S. at 48 n.9; Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 239-40 (1914). Even when land was properly classified as more valuable for agricultural use, only the grantee was in a

position to discover and exploit whatever minerals lay beneath the surface, and the minerals would remain undeveloped if he did not do so. See Western Nuclear, 462 U.S. at 48 n.9. Concerns about improper or improvident disposal of public lands and the recognition that different incentives were required to promote the concurrent development of mineral and surface resources ultimately led to a change in congressional policy. See id. at 48-50.

The first Act of Congress severing mineral rights from the surface estate and allowing the separate development of each was proposed after President Theodore Roosevelt, concerned about the fraudulent acquisition of coal lands under the agricultural land laws, withdrew 64 million acres of coal lands from all forms of entry. See Western Nuclear, 436 U.S. at 48-49 (citing 41 Cong. Rec. 2615 (1907)). That was in 1906. The next year, President Roosevelt proposed that Congress create a system that would "encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels." 41 Cong. Rec. at 2806. The first step in that direction was the Act of March 3, 1909, 30 U.S.C. 81, which authorized the issuance of patents to settlers who had made good-faith agricultural entries onto tracts later identified as coal lands, subject to "a reservation to the United States of all the coal in said lands, and the right to prospect for, mine, and remove the same." Ibid. The Act of June 22, 1910, §§ 1-3, 30 U.S.C. 83-85,

opened the remaining coal lands to settlement, subject to the same reservation of the coal to the United States. Ibid.

Congress followed the approach of reserving specific minerals for a few more years. See Act of Apr. 30, 1912, 30 U.S.C. 90 (coal); Act of July 17, 1914, 30 U.S.C. 121 et seq. (phosphate, nitrate potash, oil, gas, and asphaltic minerals). But that regime was soon abandoned in favor of a general reservation of all minerals. The first law containing a general mineral reservation was enacted in 1916. It was the Stock-Raising Homestead Act, which this Court comprehensively considered in Watt v. Western Nuclear, Inc. See 43 U.S.C. 299(a) ("all the coal and other minerals"). A number of other such laws were enacted in the 1920s and 1930s. See Recreation And Public Purposes Act, 43 U.S.C. 869 (1952) (enacted in 1926) ("all mineral deposits"); Color of Title Act, 43 U.S.C. 1068 (enacted in 1928) ("coal and all other minerals"); Taylor Grazing Act, ch. 865, § 8, 48 Stat. 1272 (enacted in 1934) ("mineral deposits") (repealed 1976); Bankhead-Jones Farm Tenant Act, ch. 517, § 44, 50 Stat. 530 (enacted in 1937) ("three-fourths of the interest of the United States in all coal, oil, gas, and other minerals") (repealed 1961). See also Federal Land Policy and Management Act of 1976, 43 U.S.C. 1719(a) ("all minerals").

b. Enacted in 1919, the Pittman Underground Water Act (Pittman Act or Act), ch. 77, 41 Stat. 293 (Pet. App. 64a-68a) (repealed by the Act of Aug. 11. 1964, Pub. L. No. 88-417, § 1, 78

Stat. 389) was one of the laws that included a general reservation of minerals to the government. The Pittman Act was passed because previous land-grant laws had not succeeded in drawing settlers to Nevada, due to "a lack of water with which to irrigate the land." 53 Cong. Rec. 706 (1916) (statement of Sen. Pittman). See also 58 Cong. Rec. 6468 (1919) (statement of Rep. Evans). The primary purpose of the Act, sponsored by Nevada Senator Key Pittman, was "to encourage the discovery of artesian water on the public domain in the State of Nevada without appropriation or expense on the part of the Government," in order to promote "[t]he future development of the agricultural land of the State." S. Rep. No. 4, 64th Cong., 1st Sess. 1-2 (1915).

The Act authorized the Secretary of the Interior to issue permits to United States citizens for tracts of "unreserved, unappropriated, nonmineral, nontimbered public lands" that were not known to be irrigable and did not exceed 2560 acres. Pittman Act § 1, 41 Stat. 293. Each permit provided the permittee with the exclusive right to drill for subsurface water within the permittee's tract for a period of two years. Ibid. If, within two years of receiving a permit, the permittee was able to demonstrate the discovery and development of sufficient water resources to raise crops on at least 20 acres, the permittee became eligible for a patent to one quarter of the tract. Id. § 5, 41 Stat. 294. The remaining three quarters of the property would thereafter be opened

for settlement by others on 160-acre tracts under the Homestead Act, ch. 75, 12 Stat. 392. Pittman Act § 6, 41 Stat. 294.

As originally introduced, the bill later enacted as the Pittman Act did not include a reservation of minerals. That version "met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands." 53 Cong. Rec. at 707 (statement of Sen. Pittman). The version that was enacted did include a mineral reservation. Section 8 of the Act provided, in pertinent part, as follows:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

41 Stat. 295 (Pet. App. 67a).

Commenting on an identical provision in an earlier version of the bill, Senator Pittman observed that the mineral reservation was "usual" and reflected "the policy of Congress" of prohibiting "the acquisition of any character of minerals through any agricultural entry." 53 Cong. Rec. at 707. In his view, "the inclusion of any such right in this grant would mean the destruction of the bill." Ibid. See also 58 Cong. Rec. at 6469 (statement of Rep. Blanton) ("If the mineral rights are properly reserved, I have no objection.").

After 40 years, "only three economic farm units ha[d] been developed" under the Act, and Congress determined that the legislation had "failed to accomplish its objective." S. Rep. No. 1282, 88th Cong., 2d Sess. 1 (1964).[1/] The Act was accordingly repealed in 1964, "subject to any valid rights and obligations existing on the date of [repeal]." Act of Aug. 11, 1964, Pub. L. No. 88-417, § 1, 78 Stat. 389.

2. On March 12, 1940, Newton and Mabel Butler obtained a patent under the Pittman Act for 560 acres of land in Lincoln County, Nevada. Pet. App. 4a; J.A. 20-21. Citing Section 8 of the Act, 41 Stat. 295, the patent reserved to the United States "all the coal and other valuable minerals in the lands so granted, together with the right to prospect for, mine, and remove the same." J.A. 21. In the early 1990s, a lessee began extracting sand and gravel from the property. Pet. App. 4a. In 1993, Earl Williams bought the property and continued to remove those materials. Id. at 4a-5a. The sand and gravel on the property was not exposed, so it was necessary to remove overburden before mining the deposit. Id. at 54a n.8.

On March 26 and April 1, 1993, the BLM issued trespass notices to Williams. J.A. 22-28. On April 23, 1993, the BLM issued a

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[1/] Based on a review of records maintained by its Bureau of Land Management (BLM), the Department of the Interior has determined that only 54 patents were issued under the Pittman Act. See U.S. Br. in Supp. of Mineral Ownership & in Opp. to Pls.' Mot. for Summ. J. 15 n.2.

decision (J.A. 29-33) finding Williams in violation of 43 C.F.R. 9239.0-7, which provides, in relevant part, that the unauthorized "extraction, severance, injury, or removal" of "mineral materials" from public lands is "an act of trespass." See Western Nuclear, 462 U.S. at 40 (BLM issuance of trespass notice based on same regulation). Williams appealed the BLM's decision to the Interior Board of Land Appeals (IBLA). Pet. App. 5a.

In 1995, while the administrative appeal was pending, petitioner BedRoc Limited, LLC (BedRoc) bought the property from Williams and continued to remove sand and gravel. Pet. App. 5a. Over the next four years, BedRoc removed sand and gravel from approximately 16.2 acres of the property, and removed an average of approximately two feet of topsoil to reach the deposits. J.A. 35-36. Pursuant to an agreement with the Department of the Interior, BedRoc placed a portion of the proceeds from the sale of the sand and gravel in escrow, pending the resolution of the dispute over ownership. Pet. App. 5a. In 1996, BedRoc transferred 40 of its 560 acres to petitioner Western Elite, Inc. (Western Elite). Id. at 2a n.2. On October 6, 1997, the IBLA affirmed the BLM's decision, finding that the sand and gravel were "valuable minerals" reserved to the United States under the Pittman Act. Id. at 39a-63a.

3. On July 13, 1998, BedRoc and Williams filed this action, which Western Elite later joined as a plaintiff (Pet. App. 2a n.2),

in the United States District Court for the District of Nevada. Pet. C.A. E.R. 1-12. The plaintiffs asked the court to quiet title to the sand and gravel and to set aside the IBLA's decision. Id. at 7-11. The government counterclaimed and sought damages for trespass. Id. at 13-26. On May 24, 1999, the district court ruled for the government. Pet. App. 22a-38a. Like the IBLA, it held that sand and gravel fall within the Pittman Act's reservation of minerals to the United States. Id. at 27a-37a.

4. The court of appeals affirmed. Pet. App. 1a-21a.

a. Observing that "full reservation of mineral rights was the policy in place at the time of the [Pittman] Act's passage" (Pet. App. 10a), and relying in part (id. at 11a-12a) on this Court's decision in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), the court of appeals concluded that "the mineral reservation in the Pittman Act is to be construed broadly. Pet. App. 12a. Western Nuclear holds that gravel is a mineral reserved to the United States in patents issued pursuant to the Stock-Raising Homestead Act. Id. at 11a. In that case, the court of appeals observed, this Court determined that Congress's intention was "to facilitate development of both surface and subsurface resources"; that whether a resource should be deemed part of the surface or the mineral estate therefore depends on "the use of the surface estate that Congress contemplated"; that the statute at issue contemplated that the surface estate would be used for stock-

raising and raising crops; and that interpreting the statute "to convey gravel deposits to the farmers and stockmen who made entries under the Act" would "in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere." Id. at 11a-12a (quoting 462 U.S. at 52, 56). The court of appeals concluded that the same reasoning applies to the Pittman Act. Id. at 12a.

b. The court acknowledged that the statute at issue in Western Nuclear reserved "all the coal and other minerals," without using the modifier "valuable." Pet. App. 16a. It concluded, however, that, "even if Congress intended the word 'valuable' to limit the kinds of minerals reserved to the United States" under the Pittman Act, sand and gravel were reserved. Ibid. As support for that conclusion, the court relied on contemporaneous government reports on mineral resources reflecting that sand and gravel were produced in large quantities in the years leading up to the passage of the Pittman Act, and had substantial value. Id. at 16a-17a.

c. The court of appeals rejected petitioners' argument that, even if sand and gravel were "valuable in some areas at the time of enactment," there could have been no viable market for the sand and gravel "in this parcel at the time of this patent." Pet. App. 17a-18a. The court declined petitioners' invitation to apply a "site-specific analysis" to the question whether a resource is a

"valuable mineral." Id. at 18a. In particular, the court rejected petitioners' contention that the term "valuable minerals" in the Pittman Act has the same meaning as the term "valuable mineral deposits" in the General Mining Act of 1872, 30 U.S.C. 22, under which a particular mineral deposit is locatable if it "would lead a prudent person to believe that a commercially viable mine could be operated with respect to that deposit." Pet. App. 18a. The court reasoned that the word "valuable" in the General Mining Act modifies "deposits," not "mineral," and noted that "[n]ot every deposit of minerals -- no matter how 'valuable' the mineral itself may be -- is sufficient to constitute a 'valuable mineral deposit' under the General Mining [Act]." Id. at 18a-19a.

SUMMARY OF ARGUMENT

I. In Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), this Court interpreted the Stock-Raising Homestead Act (SRHA), ch. 9, 39 Stat. 862, which authorized the issuance of patents to entrymen who increased the value of stock-raising land, subject to a reservation to the United States of "all the coal and other minerals" in the land. Pet. App. 69a. The issue in Western Nuclear was whether gravel found on patented lands fell within the mineral reservation. For three principal reasons, the Court held that it did. First, the Court relied on the statutory purpose: encouraging the concurrent development of both the surface and subsurface of patented lands. Since Congress intended that SRHA

lands would be used for stock-raising and raising crops, and since those uses do not ordinarily entail the extraction of gravel, the Court concluded that gravel was a "mineral" reserved to the government. Second, the Court relied on the fact that Congress contemplated that mineral deposits on SRHA lands would be subject to location under the general mining laws, and the fact that administrative and judicial decisions had recognized that gravel is locatable. Third, the Court relied on the interpretive principle requiring that land grants be construed in favor of the government. Each of these grounds is equally applicable to the Pittman Act, which, like the SRHA, was an early-20th-century law that granted land to patentees for agricultural purposes and severed the surface estate from the mineral estate to encourage the concurrent development of surface and subsurface lands.

II. Petitioners are mistaken in their contention that, because the SRHA reserved "all the coal and other minerals" (Pet. App. 69a) while the Pittman Act reserved "all the coal and other valuable minerals" (id. at 67a), Western Nuclear is distinguishable. As that decision makes clear, and as petitioners acknowledge, a "mineral" is by definition a valuable substance, so it is not likely that Congress intended "valuable" to be a word of limitation. That view is confirmed by the Pittman Act's text and legislative history. The word "mineral" appears eight times in Section 8 of the Act but is modified by "valuable" only twice, and

the context makes clear that the noun has the same meaning regardless of whether the adjective precedes it. The House Report on the bill that became the Pittman Act, moreover, explicitly states that "Section 8 of the bill contains the same reservation[] of minerals * * * as was provided in the [SRHA]." H.R. Rep. No. 286, 66th Cong., 1st Sess. 1 (1919). Nor is there any reason to suppose that, in enacting the Pittman Act, Congress intended to depart from the two established categories of mineral reservations in land-grant statutes: those that reserved specific minerals and those that reserved all minerals. Even if there is a difference between "minerals" and "valuable minerals," however, the editions of the Department of the Interior's annual publication Mineral Resources of the United States that were published in the late 1910s demonstrate that sand and gravel were valuable at the time the Act was passed.

III. Petitioners are also mistaken in their contention that Western Nuclear does not foreclose the view that gravel and sand are reserved "minerals" only if they could have been profitably extracted from the patentee's land at the time the patent was issued. Western Nuclear does foreclose that view, in two different ways. First, the Court's holding that the definition of mineral "includes gravel," because, among other things, gravel "can be * * * used for commercial purposes," 462 U.S. at 55, reflects a categorical rather than a "site-specific" approach to the issue.

Second, the principal basis for the Court's holding that gravel is a mineral reserved to the government is that it was not needed for stock-raising or farming and thus might have gone unexploited if included in the surface estate granted to the patentee. That is true regardless of when it became profitable to extract the gravel.

Adoption of petitioners' retrospective, "site-specific" approach would also have a number of consequences that Congress should be presumed not to have intended. First, because the Pittman Act required a determination that the land was "nonmineral" before a permit could be issued, adopting petitioners' approach would mean that the mineral reservation would apply only if, during the usually short period between the determination of the land's nonmineral character and the issuance of the patent, a valueless resource somehow became valuable. Second, because it will not always be obvious whether a substance could have been profitably extracted at the time of the patent, petitioners' approach would require the decisionmaker in many cases to undertake the difficult task of determining, retrospectively and hypothetically, whether it would have been profitable, years or decades ago, to extract resources from land from which they were not in fact extracted. Third, because the profitability of extracting sand and gravel could vary over time and depend on economic or political circumstances beyond the patentee's control, similarly situated patentees could be granted dissimilar property rights based on the

happenstance of when the land was patented. If there is any remaining doubt about whether Congress intended a "site-specific" approach, however, that doubt should be resolved in the government's favor, based on the interpretive canon requiring a narrow construction of land grants by the United States.

IV. Petitioners' invitation to overrule Western Nuclear should be declined. Stare decisis considerations are at their peak in a case, like this one, where the precedent in question involved both a question of statutory interpretation and the allocation of property rights. Congress could have taken corrective action in the intervening 20 years if it had disagreed with the decision in Western Nuclear, but it has not chosen to do so. In the meantime, hundreds of contracts in which the government granted the right to extract sand or gravel (or a similar substance) from lands patented under the SRHA (or a similar law) have been executed in reliance on Western Nuclear. Those contracts are worth tens of millions of dollars. Petitioners are mistaken in their contention that the Court clearly erred in Western Nuclear by not relying on the Secretary of the Interior's decision in Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910), overruled, Layman v. Ellis, 52 Pub. Lands Dec. 714 (1929), which held that lands valuable because of sand and gravel deposits were not "mineral lands" under the applicable homestead law. The Court correctly recognized that Zimmerman was not the only evidence of the meaning of "minerals" at

the time of the SRHA's enactment, and that much of the other evidence pointed in the opposite direction.

ARGUMENT

THE SAND AND GRAVEL EXTRACTED FROM PETITIONERS' LAND WAS RESERVED TO THE UNITED STATES UNDER THE PITTMAN ACT

This case involves the Pittman Underground Water Act. In Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), this Court interpreted the Stock-Raising Homestead Act, a similar land-grant statute from the same era with a nearly identical mineral reservation, and found that gravel was reserved to the United States under the statute. The Court's reasoning in Western Nuclear is equally applicable to the Pittman Act, and that decision explicitly rejected one of the principal theories on which petitioners rely in this case.

Confronted with the obstacle of Western Nuclear, petitioners attempt to surmount it in three different ways. First, they contend that Western Nuclear is distinguishable, because the statute at issue there reserved "all the coal and other minerals," while the statute at issue here reserved "all the coal and other valuable minerals." Second they contend that, even if Western Nuclear is not distinguishable, it did not address one of the arguments they raise here, which is whether a mineral (or valuable mineral) like gravel or sand falls within the statute's reservation if it could not have been profitably extracted from the patentee's land at the time the patent was issued. Third, they contend that,

if Western Nuclear is not distinguishable and a "site-specific" analysis is not appropriate, then Western Nuclear should be overruled.

Each of these contentions is without merit. As to the first: The phrase "coal and all other valuable minerals" in the Pittman Act has the same meaning as the phrase "coal and all other minerals" in the SRHA, and even if it has a narrower meaning, sand and gravel were valuable minerals when the Pittman Act was passed. As to the second: A "site-specific" approach is foreclosed by Western Nuclear, cannot be reconciled with the Pittman Act's text and structure, would increase litigation and uncertainty, could lead to differential treatment of similarly situated patentees, and in any event must be rejected because of the rule requiring a narrow construction of land grants by the United States. As to the third: Petitioners' invitation to overrule Western Nuclear should be declined, because petitioners cannot overcome the presumption in favor of stare decisis, which is at its strongest when, as in this case, the precedent involved a question of statutory construction and affected property and contract rights.

I. WESTERN NUCLEAR RESOLVED THE QUESTION WHETHER GRAVEL AND SAND ARE RESERVED TO THE UNITED STATES UNDER A PATENT ISSUED PURSUANT TO A STATUTE OF THE KIND AT ISSUE HERE

The SRHA authorized the issuance of patents for "stock-raising lands." Western Nuclear, 462 U.S. at 38 (quoting 43 U.S.C. 291 (1970) (repealed 1976)). To obtain such a patent, the entryman was

required to live on the land for three years and make improvements "tending to increase the value of the [land] for stock-raising purposes." Ibid. (quoting 43 U.S.C. 293 (1970) (repealed 1976)). Section 9 of the SRHA provided that all patents "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." 39 Stat. 864 (Pet. App. 69a). The language of this reservation is identical to that in Section 8 of the Pittman Act, except for one word: the latter reservation uses the phrase "all the coal and other valuable minerals," 41 Stat. 295 (Pet. App. 67a), rather than "all the coal and other minerals." The SRHA also provided, in language identical to that in the Pittman Act, ibid., that the mineral deposits in the patented lands shall be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 39 Stat. 864 (Pet. App. 69a).

The question presented in Western Nuclear was "whether gravel found on lands patented under the [SRHA] is a mineral reserved to the United States." 462 U.S. at 38. The Court held that it was. Noting that the meaning of the word "minerals" depends on the context in which it is used, id. at 42-43, the Court first concluded that there were conflicting indications concerning "[t]he legal understanding of the term * * * prevailing in 1916," id. at

44, and that the contemporaneous understanding of the term thus did not "shed[] much light" on the question whether Congress intended the mineral reservation in the SRHA to encompass gravel, id. at 46-47. In reaching that conclusion, the Court rejected the argument that a 1910 administrative decision by the Secretary of the Interior, Zimmerman v. Brunson, 39 Pub. Lands Dec. 310, demonstrated that Congress did not intend the term "minerals" to encompass gravel. Id. at 45-46. The Court went on to explain that the purposes of the SRHA (id. at 46-56), the treatment of gravel under the general mining laws (id. at 56-59), and the canon requiring that land grants be construed in the government's favor (id. at 59-60) all supported its conclusion that gravel was reserved by the SRHA. As explained below, each of the grounds for the Court's decision in Western Nuclear is applicable to the Pittman Act, including the Court's rejection of the argument, also made by petitioners here, that the Secretary of the Interior's decision in Zimmerman requires the conclusion that gravel was not a reserved mineral.

A. The Reasoning Of Western Nuclear Is Equally Applicable To The Pittman Act

1. In Western Nuclear, the Court found that "the purposes of the SRHA" provided "strong[] support" for the view that gravel is a "mineral" reserved to the United States. 462 U.S. at 47. The SRHA, the Court observed, was "the most important of several federal land-grant statutes enacted in the early 1900s that

reserved minerals to the United States," rather than classifying a tract of land as "mineral or nonmineral" and disposing of title to the entire tract on the basis of the classification, as had been the practice under "the old system." Ibid. Congress's purpose in "severing the surface estate from the mineral estate," the Court said, was "to encourage the concurrent development of both the surface and subsurface of SRHA lands." Id. at 50. The Court thus concluded that "whether a particular substance is included in the surface estate or the mineral estate" depends on "the use of the surface estate that Congress contemplated." Id. at 52. Since Congress expected that "the surface of SRHA lands would be used for ranching and farming," id. at 53, and since those uses "do not ordinarily involve the extraction of gravel," id. at 56, the Court interpreted the reservation of "minerals" in the SRHA to include gravel, id. at 55-56. Interpreting the SRHA "to convey gravel deposits to the farmers and stockmen who made entries under the Act," the Court explained, would be tantamount to saying that "Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere." Id. at 56.

The same reasoning applies here. First, like the SRHA, the Pittman Act was an early-20th-century land-grant statute that departed from the old classification system by severing the surface estate from the mineral estate to encourage concurrent development

of surface and subsurface lands. The language of the mineral reservation in Section 8 of the Act is identical, but for a single word, to that in Section 9 of the SRHA, and the House Report on the bill that became the Pittman Act described the reservation in Section 8 as "the same reservation[] of minerals, with the facility for prospecting for and developing and mining such minerals," that was provided in the SRHA. H.R. Rep. No. 286, 66th Cong., 1st Sess. 1 (1919).

Second, as with SRHA lands, Congress expected that the surface of Pittman Act lands would be used by patentees for farming, an activity, as this Court made clear in Western Nuclear, 462 U.S. at 52-56, that does not ordinarily entail the extraction of sand and gravel. That Pittman Act lands were to be used for agricultural purposes is clear from both the text and the legislative history of the Act. Section 3 of the Act obligated an applicant for a permit to submit an affidavit that the application was made "for the purpose of reclamation and cultivation" (41 Stat. 294); Section 5 entitled a permittee to a patent for a portion of the land if the permittee discovered underground waters in sufficient quantity to produce at a profit "agricultural crops other than native grasses" on at least 20 acres (41 Stat. 295); and Section 6 provided for the distribution of the remaining portion of the land pursuant to the Homestead Act, ch. 75, 12 Stat. 392, which in turn required the entryman to use the land "for the purpose of actual settlement and

cultivation" (id. § 2, 12 Stat. 392). The House Report on an earlier bill (which included the same mineral reservation that appeared in Section 8 of the Act, see 53 Cong. Rec. at 705) stated that the "primary object of the bill" was "to encourage the development of the agricultural portions of the public domain in the State of Nevada" that could not be irrigated from any known water source, H.R. Rep. No. 731, 64th Cong., 1st Sess. 1 (1916), and the House Report on the bill that became the Pittman Act noted that the government's failure to provide a law like the one proposed had resulted in "the retarding of agricultural development in Nevada," H.R. Rep. No. 286, supra, at 2.

Petitioners contend that the Pittman Act is unlike the SRHA, because patents under the latter law were granted for improving the land by farming or ranching, while patents under the former law were granted for successful prospecting for water. Pet. Br. 27, 33. That characterization is inaccurate. As its first sentence demonstrates, the Pittman Act was "[a]n Act to encourage the reclamation of certain arid lands in the State of Nevada," 41 Stat. 293 (Pet. App. 64a), not to encourage prospecting for water for its own sake. In any event, the distinction proffered by petitioners is irrelevant to the analysis employed in Western Nuclear, which makes clear that the determination of whether a particular substance is included in the surface estate or the mineral estate is to be made in light of "the use of the surface estate that

Congress contemplated." 462 U.S. at 52. Both the SRHA and the Pittman Act contemplated that the surface estate would be used for agricultural purposes, a use that does not ordinarily entail the extraction of sand or gravel.

2. In holding that gravel is a "mineral" under the SRHA, the Court in Western Nuclear also found it "highly pertinent" that administrative and judicial decisions "recognized that gravel deposits could be located under the general mining laws" before enactment of the Act of July 23, 1955, 30 U.S.C. 611, which prospectively excluded common varieties of gravel (as well as sand) from the purview of those laws and provided for disposal of deposits of those substances by other means under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. 601. 462 U.S. at 57 & n.15. The Court concluded that the mining laws' treatment of gravel as a mineral "suggests that gravel should be similarly treated under the SRHA," because Congress "clearly contemplated that mineral deposits in SRHA lands would be subject to location under the mining laws." Id. at 59. The same reasoning applies to the Pittman Act, which likewise contemplated that mineral deposits would be subject to location under the mining laws. Compare SRHA § 9, 39 Stat. 864, with Pittman Act § 8, 41 Stat. 295.

3. In Western Nuclear, the Court found its conclusion that gravel is a "mineral" reserved by the SRHA to be "buttressed" by an important rule of interpretation: "the established rule that land

grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." 462 U.S. at 59 (quoting United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957)). Indeed, the Court reasoned, that rule applied "with particular force" in the case before it, because the SRHA's legislative history, which included a statement by the bill's manager in the House of Representatives that the reservation covered "every kind of mineral," id. at 59-60 (quoting 53 Cong. Rec. at 1171 (statement of Rep. Ferris)), reflected Congress's understanding that the mineral reservation would "limit the operation of this bill strictly to the surface of the lands," id. at 60 (quoting H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916)) (emphasis added by the Court). The same canon of construction applies to the Pittman Act, which is a similar land-grant statute. And as with the SRHA, that canon applies with "particular force," id. at 59-60, because an intention to enact a broad mineral reservation is also reflected in the Pittman Act's legislative history, which includes a statement by the law's sponsor that the reservation reflected the policy of Congress to prohibit the acquisition of "any character of minerals" under an agricultural patent, 53 Cong. Rec. at 707 (statement of Sen. Pittman).[2/]

[2/] Petitioners cite Leo Sheep Co. v. United States, 440 U.S. 668 (1979), for the proposition that the Pittman Act should receive a "liberal construction" in favor of the patentee. Pet. Br. 26-27 (quoting 440 U.S. at 683). But the Court's refusal to apply the principle of narrow construction in that case depended on the fact that the grant at issue was made under the railroad laws, to which the principle does not apply "in its full vigor." 440 U.S. at 682. In any event, Leo Sheep was decided before Western Nuclear, which applied the principle of narrow construction to a statute that is similar to the Pittman Act.

B. Western Nuclear Explicitly Rejected The Argument That The Secretary Of The Interior's Decision In Zimmerman v. Brunson Requires The Conclusion That Gravel And Sand Are Not Reserved Minerals

In support of their claim that sand and gravel are not minerals reserved to the United States under the Pittman Act, petitioners and their amici rely heavily on Zimmerman v. Brunson, 39 Pub. Lands Dec. 310, a 1910 decision by the Secretary of the Interior. Zimmerman involved a challenge to a homestead entry on the ground that the land was valuable due to the presence of gravel and sand and was therefore "mineral land" that could not be settled under the applicable homestead law. Id. at 311-312. The Secretary rejected the challenge. He concluded that lands containing deposits of gravel and sand useful for general building purposes were not "mineral lands" under the homestead laws, except when the deposits "possess a peculiar property or characteristic giving them a special value." Id. at 312-313. In 1929, Zimmerman was overruled by the Secretary in Layman v. Ellis, 52 Pub. Lands Dec. 714.

Invoking the principle that "the contemporaneous understanding of a statutory term is the touchstone in determining what Congress

intended by that term," and quoting Zimmerman, petitioners contend that, "[a]t the time of enactment of the Pittman Act," the Department of the Interior "had explicitly determined that sand, gravel, and other common materials were not to be regarded as 'minerals' for purposes of the mining laws" unless there was "some 'peculiar property or characteristic giving them a special value.'" Pet. Br. 17 (quoting 39 Pub. Lands Dec. at 312). Accord id. at 28, 35-36, 41-42; Nat'l Stone, Sand & Gravel Ass'n (NSSGA) Br. 10, 12-16. This very argument was made, and decisively rejected, in Western Nuclear. In support of its claim that gravel is not a mineral reserved to the government under the SRHA, the owner of the surface estate in Western Nuclear argued that Zimmerman was "evidence that Congress could not have intended the term 'minerals' [in the SRHA] to encompass gravel." 426 U.S. at 45. While acknowledging that "the legal understanding of a word prevailing at the time it is included in a statute is a relevant factor to consider in determining the meaning that the legislature ascribed to the word," the Court categorically rejected the suggestion that Zimmerman showed that "Congress understood the term 'minerals' to exclude gravel." Id. at 45-46.

The Court reached that conclusion for four different reasons. First, the Court thought it "unlikely that many Members of Congress were aware of the ruling in Zimmerman, which was never tested in the courts and was not mentioned in the Reports or debates on the

SRHA." Id. at 46. Second, even if Congress had been aware of Zimmerman, the Court saw "no reason to conclude that it approved of the Secretary's ruling in that case" rather than the Court's own decision in Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526 (1903), "which adopted a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." 462 U.S. at 46.[3/] Third, even if Congress intended to follow the approach of the Department of the Interior, the Court saw "little basis for inferring that it intended to follow the specific ruling in [Zimmerman] rather than the Interior Department's general approach in classifying land," under which land containing deposits of "common substances" was "mineral land" if the deposits made the land "more valuable on account thereof than for agricultural purposes." Id. at 46 n.7 (quoting Pacific Coast Marble Co. v. Northern Pac. R.R., 25 Pub. Lands Dec. 233, 245 (1897)). Fourth, the Court noted that, in 1913, three years before the SRHA's

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[3/] The issue in Soderberg was whether lands valuable for granite quarries were "mineral lands" excepted from a grant of land to a railroad company. 188 U.S. at 529. The Court held that they were. Id. at 529-537. It defined "minerals lands" to include "not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." Id. at 536-537. The Court noted that English cases had generally "adopted the construction that valuable stone passed under the definition of minerals," id. at 535, and quoted an English court's statement that the term "mineral" in a reservation from a grant of land includes anything, other than "the mere surface," that is "useful for any purpose whatever," such as "gravel, marble, fire clay, or the like," id. at 536 (quoting Midland Ry. v. Checkley, 4 L.R.-Eq. 19, 25 (1867)).

enactment, "the Interior Department itself listed gravel as a mineral in a comprehensive study of the public lands." Ibid. (citing United States Geological Survey, Department of the Interior, Bulletin 537, The Classification of the Public Lands 138-139 (1913)).

If Zimmerman did not require the conclusion that the SRHA reserved gravel, it cannot require the conclusion that the Pittman Act reserved gravel or sand.[4/] Indeed, although petitioners claim that the SRHA and Pittman Act should be interpreted differently because the former uses the term "minerals" while the latter uses the term "valuable minerals," a contention addressed in Point II, infra, they present no serious argument that the Zimmerman definition of "minerals" could apply in one law but not the other.

II. WESTERN NUCLEAR IS NOT DISTINGUISHABLE ON THE GROUND THAT THE STATUTE AT ISSUE THERE RESERVED "MINERALS" RATHER THAN "VALUABLE MINERALS"

Petitioners contend that Western Nuclear is distinguishable, because the SRHA reserved "all the coal and other minerals" in the patented lands, while the Pittman Act reserved "all the coal and other valuable minerals." Pet. Br. 14-17, 32-33 & n.15. See also Assoc. Gen. Contractors of America (AGCA) Br. 13-14; NSSGA Br. 7-8. This contention is without merit. The settled definition of "minerals," the text and legislative history of the Pittman Act,

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4/ Petitioners do not argue that there is any legally relevant distinction for present purposes between gravel and sand.

and the improbability that Congress intended to create a new and unique type of mineral reservation demonstrate that "valuable minerals" has the same meaning as "minerals." And even if it does not, sand and gravel still fall within the Pittman Act's reservation, because they are valuable now and were valuable when the Act was passed.

A. The Term "Coal And Other Minerals" In The Stock-Raising Homestead Act Is No Broader Than The Term "Coal And Other Valuable Minerals" In The Pittman Act

1. The issue in Western Nuclear was the meaning of the term "minerals" in the SRHA's reservation to the United States of "all the coal and other minerals" in lands patented under that law. Pet. App. 69a. Interpreting the word "in light of the use of the surface estate that Congress contemplated" when it enacted the SRHA, namely, "stockraising and raising crops," 462 U.S. at 52-53, the Court defined "minerals" as "substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." Id. at 53 (emphasis added). As support for that definition, which gravel was held to satisfy, id. at 55-56, the Court quoted a treatise on mining law, its decision in Soderberg, and a decision by the Secretary of the Interior, each of which stated that a "mineral" is something that has "value" or is

"valuable." Id. at 53.[5/] The Court went on to say that its interpretation "best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources," because "ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value." Id. at 53-54 (emphasis added).

Western Nuclear thus makes clear that, by its very nature, a "mineral" reserved to the government under the SRHA is a substance that has "value." See also Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 878 (1999) (describing SRHA's mineral reservation as one that contained "a general reservation of valuable minerals in the lands"). Indeed, petitioners themselves contend that "value" is central "to determining which materials are 'mineral,'" and provide a definition of "minerals" that is essentially identical to the one in Western Nuclear: "mineralogical substances that can be extracted from the earth and

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[5/] See 1 American Law of Mining § 326 (1982) ("A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value.") (emphasis added); Soderberg, 188 U.S. at 536-537 ("mineral lands include * * * all [lands] as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or for purposes of manufacture") (emphasis added); United States v. Isbell Constr. Co., 78 Interior Dec. 385, 390 (1971) ("the reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and have a separate value") (emphasis omitted in part).

that have independent value distinct from the surrounding earth." Pet. Br. 18-19. In light of this accepted definition, Congress did not intend the Pittman Act's reservation of "valuable minerals" to be any narrower than the SRHA's reservation of "minerals," which are necessarily valuable. Instead of using the unadorned term "minerals" in the Pittman Act, Congress expressed the same idea by including what can fairly be regarded as the two essential elements of the term's settled definition. See 1 American Law of Mining § 8.01[2] (2001) ("Two general criteria are used to determine whether a particular inorganic substance is a mineral: (1) the substance must be recognized by the standard authorities as a mineral, and (2) it must have commercial value.").

2. That Congress considered "valuable minerals" to be synonymous with "minerals" is confirmed by the text of Section 8 of the Pittman Act. The word "mineral" or "minerals" appears eight times there, but is modified by the word "valuable" on only the first two occasions. 41 Stat. 295 (Pet. App. 67a-68a). If Congress had intended "valuable minerals" to be a narrower term than "minerals," such that the latter included non-valuable minerals that were within the grant, it would be difficult to make sense of Section 8, which reserved to the United States "all the coal and other valuable minerals" in patented lands, but also granted qualified persons the right to enter those lands to prospect for "coal or other mineral therein." 41 Stat. 295 (Pet.

App. 67a). Under petitioners' theory, those persons would be able to prospect for minerals that did not belong to the United States.

According to petitioners, all that matters is that "the reservation refers to 'valuable minerals.'" Pet. Br. 32 n.15. But petitioners do not explain why Congress would have used the modifier in one additional instance but not in the other six. The apparently arbitrary use of the adjective is not consistent with the view that Congress consciously used it as "a word of limitation." Id. at 33. In Western Nuclear, the Court held that the "express listing" of "coal" in the SRHA's mineral reservation "was not intended to limit" the phrase "other minerals," and relied, as support for that holding, on "the alternate use of the phrases 'coal and other minerals' and 'all minerals' in the House Report on the bill that became the SRHA." 462 U.S. at 44 n.5 (citing H.R. Rep. No. 35, supra, at 18). The same principle applies to the adjective "valuable" in the Pittman Act.

Nor does petitioners' theory find any support in the Pittman Act's legislative history. If Congress had intended the word "valuable" to narrow the reservation in the manner petitioners urge, one would expect to find at least some indication of that intention in the congressional debates or reports. But there is not the slightest suggestion in either that "valuable minerals" are different from "minerals." On the contrary: In the one instance in the recorded legislative history where the mineral reservation

in the bill that became the Pittman Act was compared with the mineral reservation in the SRHA, the view expressed was that the reservations were identical. See H.R. Rep. No. 286, supra, at 1 ("Section 8 of the bill contains the same reservations of minerals, with the facility for prospecting for and developing and mining such minerals as was provided in the [SRHA] which was passed by Congress."). And the sponsor's description of the reservation as one that broadly prohibits the acquisition of "any character of minerals," 53 Cong. Rec. at 707 (statement of Sen. Pittman), reinforces the conclusion that the reservations are identical.

Petitioners' theory should also be rejected because, under their interpretation, Section 8 of the Pittman Act would constitute a departure from the two well-established categories of mineral reservations in land-grant statutes. The first (and earlier) type reserved only certain specified minerals,[1/] while the second (and later) type contained a general reservation of all minerals.[2/]

[1/] See Act of Mar. 3, 1909, 30 U.S.C. 81 (coal); Act of June 22, 1910, 30 U.S.C. 83-85 (same); Act of Apr. 30, 1912, 30 U.S.C. 90 (same); Act of July 7, 1914, 30 U.S.C. 121 et seq. (phosphate, nitrate potash, oil, gas, and asphaltic minerals).

[2/] See Stock-Raising Homestead Act, 43 U.S.C. 299(a) ("all the coal and other minerals"); Recreation and Public Purposes Act, 43 U.S.C. 869 (1952) ("all mineral deposits"); Color of Title Act, 43 U.S.C. 1068 ("coal and all other minerals"); Taylor Grazing Act, ch. 865, § 8, 48 Stat. 1272 ("mineral deposits"); Bankhead-Jones Farm Tenant Act, ch. 517, § 44, 50 Stat. 530 ("three-fourths of the interest of the United States in all coal, oil, gas, and other minerals"); Federal Land Policy and Management Act of 1976, 43 U.S.C. 1719(a) ("all minerals").

Under petitioners' view, the Pittman Act -- and, as far as we are aware, the Pittman Act alone -- would be a third, intermediate, type of statute, which reserved a limited class of minerals without specifying what those minerals were. Since petitioners identify no reason why Congress might have departed from its uniform practice of including either a specific or a general mineral reservation in land-grant statutes, it should be presumed that, in enacting the Pittman Act, Congress was not creating a novel and unique type of reservation. Such a presumption is particularly warranted because the reservation as petitioners interpret it would create substantially more uncertainty than the two established types, and because the law's sponsor described the reservation as "usual" under the policy of Congress of reserving "any character of minerals." 53 Cong. Rec. at 707 (statement of Sen. Pittman).

3. Citing this Court's decision in Duncan v. Walker, 533 U.S. 167 (2001), petitioners contend that the Pittman Act's reservation of "valuable minerals" should be construed more narrowly than the SRHA's reservation of "minerals" because it is "a basic rule of statutory construction that each word must be given significance." Pet. Br. 32-33. Treating the term "valuable minerals" as synonymous with "minerals" does not violate that rule. "It is no superfluity for Congress to clarify what had been * * * unclear," BFP v. Resolution Trust Corp., 511 U.S. 531, 544 n.7 (1994), and this Court had observed 16 years before the Pittman Act

was passed that the word "minerals" is "used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case," Soderberg, 188 U.S. at 530, quoted in Western Nuclear, 462 U.S. at 42-43. And as this Court's decision in Western Nuclear shows, a "mineral" can be an inorganic substance, or it can be an inorganic substance that is capable of being removed from the soil and used for commercial purposes. 462 U.S. at 42-44, 53. The adjective "valuable" may have been added to make clear that the latter sense was intended.

In any event, as the Court has subsequently made clear, "other circumstances evidencing congressional intent can overcome the[] force" of the interpretive principle on which petitioners rely. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001). That is true here. Because a "mineral" is by definition "valuable," because Congress appears to have used "mineral" and "valuable mineral" interchangeably in the Pittman Act, because the legislative history explicitly states that the mineral reservation in the Pittman Act is the same as that in the SRHA, and because there is no reason to believe that Congress intended to create a new and imprecise type of mineral reservation, reliance on the canon invoked by petitioners "would conflict with the intent embodied in the statute Congress wrote." Ibid. In sum, if gravel is a "mineral" reserved by the SRHA, as Western Nuclear holds, then

gravel and sand are necessarily "valuable minerals" reserved by the Pittman Act.

B. Even If There Is A Difference Between "Minerals" And "Valuable Minerals," Sand And Gravel Were "Valuable Minerals" When The Pittman Act Was Enacted

Between 1914 and 1919, in an annual publication called Mineral Resources of the United States, in a section entitled "Sand and Gravel," the Department of the Interior provided data and other information concerning the production of sand and gravel in the United States. See J.A. 37-118. That information demonstrates that sand and gravel were valuable at the time of the Pittman Act's enactment.

In the 1914 publication, the Department described the increase in the production of sand and gravel over the previous decade, and noted that nearly 80 million short tons of those substances, with a value of nearly $24 million, were produced in the United States in 1914. J.A. 38-39. Two years later, the Department observed that the production of sand and gravel in 1916 was "unprecedentedly large"; that "[a]ll kinds of sands increased in total value, and most of them increased in quantity"; and that "[f]rom many parts of the country it was reported by producers that they could not get enough men to operate at the desired capacity or enough cars to meet their requirements." J.A. 60.

In 1917, the year in which the United States entered the First World War, the Department had this to say in its annual

publication:

> It is well known that sand and gravel are widely distributed, abundant, and much used in the United States, but their vital importance in the economy of the Nation was scarcely appreciated until war made unusual conditions and demands. The demand has been so great in recent months that in some places on the Atlantic coast sand and gravel have almost attained the status of war minerals. At certain shipbuilding and camp sites there is no gravel readily available and sand suitable for building is scarce. * * * So great has been the demand for sand and gravel in large Government construction work that this common and cheap building material has been shipped considerable distances. It is understood that for some of the building recently done near Norfolk, VA., where the supply is inadequate, the sand and gravel were brought from New York, a distance of 300 miles * * * .

J.A. 72. The Department went on to report that the sand and gravel produced in 1917 had a value of more than $35 million, and that only four non-metallic minerals produced in the United States -- petroleum, natural gas, coal, and stone -- had a greater annual value. J.A. 72-73.

The next year's publication reported that the value of sand and gravel produced had increased to nearly $38 million in 1918, J.A. 88, when, because of the "exigencies of war," the "entire output of some sand and gravel concerns was commandeered by the Government," J.A. 89. And the next year's publication reported that the value of sand and gravel was nearly $46 million in 1919, the year in which the Pittman Act was enacted. J.A. 104.

In view of the fact that sand and gravel had one of the highest values of all non-metallic minerals produced in the United States in 1917, and that there was a shortage of those minerals in

1917 and 1918, when the War Department had an urgent need for them and received shipments from remote locations, it is highly unlikely, to say the least, that Congress would not have considered sand and gravel to be "valuable" minerals in 1919. Thus, even if "valuable minerals" are a narrower class than "minerals," sand and gravel are "valuable minerals" reserved by the Pittman Act.

III. TO BE A RESERVED MINERAL, A SUBSTANCE NEED NOT HAVE BEEN CAPABLE OF BEING PROFITABLY EXTRACTED FROM THE PATENTEE'S LAND AT THE TIME THE PATENT WAS ISSUED

Petitioners contend that, even if Western Nuclear is not distinguishable, it did not decide one of the arguments they raise here: whether gravel (or sand) is a "mineral" (or a "valuable mineral") reserved to the United States if it could not have been profitably extracted from the patentee's land at the time of the patent. Pet. Br. 33-34. Petitioners contend that this remains an open question, the answer to which is no. Id. at 17-25. Petitioners are mistaken. Their theory is foreclosed by Western Nuclear; is inconsistent with the text and structure of the Pittman Act; would require retrospective and hypothetical profitability analyses; could result in differential treatment of similarly situated patentees; and cannot be squared with the interpretive principle requiring that land grants be construed in favor of the government.

A. Petitioners' "Site-Specific" Theory Is Foreclosed By Western Nuclear

The holding of Western Nuclear is that "gravel is a mineral reserved to the United States in lands patented under the SRHA." 462 U.S. at 60. There is no suggestion in the Court's opinion that that holding depends on whether that gravel could have been profitably extracted from the particular tract of land in question at the time the patent was issued.[8/] And there is more than a suggestion that it does not. In holding as it did, the Court employed a four-part definition of "minerals." They are substances, the Court said, "[1] that are mineral in character (i.e., that are inorganic), [2] that can be removed from the soil, [3] that can be used for commercial purposes, and [4] that there is no reason to suppose were intended to be included in the surface estate." 462 U.S. at 53. The Court went on to say that this definition "includes gravel," and that gravel satisfies the third element of the definition because it "can be * * * used for commercial purposes." Id. at 55. To say that gravel can be used for commercial purposes is to say that the mineral, as a

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[8/] Indeed, there is nothing in the Court's opinion to suggest that gravel could in fact have been profitably extracted from the tract in question at the time the patent was issued. The tract, which was located in Jeffrey City, Wyoming, was purchased in 1975 by a company that extracted gravel for use in connection with the mining of uranium. But uranium had not been discovered in the area until the 1950s, which was 25 years after the patent was issued. Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654, 655-656 (D. Wyo. 1979), rev'd, 664 F.2d 234 (10th Cir. 1981), rev'd, 462 U.S. 36 (1983).

categorical matter, is capable of being used for such purposes. That proposition is quite different from saying that the particular gravel in the case could in fact have been profitably extracted at the time of the patent.

While Western Nuclear employed a definition of "minerals" that is broader than the one that petitioners urge the Court to adopt, it is nevertheless true that Western Nuclear did not explicitly address the "site-specific" argument that petitioner makes in this case. But even if the question remains, in that sense, an open one, the Court's reasoning in Western Nuclear requires that the "site-specific" theory be rejected.

The Court made clear in Western Nuclear that "Congress' purpose in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and subsurface of [the patented] lands." 462 U.S. at 50. One principal basis for the Court's holding that gravel is a mineral reserved to the United States was that Congress expected the surface of patented lands to be used for stock-raising and raising crops, and that interpreting the statute to include gravel in the surface estate would therefore mean that Congress intended to make the exploitation of gravel dependent on "the initiative of persons whose interests were known to lie elsewhere." Id. at 56. That reasoning applies regardless of when a subsurface resource might become commercially exploitable. Petitioners posit the scenario in

which the surface of a tract of land was patented for agricultural use, and then, at some point thereafter, an economic, demographic, or other development gave commercial value to gravel that would have been valueless if extracted from the subsurface at the time of the patent. But under that scenario, it would still be the case -- if the gravel were deemed part of the surface estate -- that its exploitation would be dependent on someone whose "interests * * * lie elsewhere." Ibid. The approach proposed by petitioners would thus undermine the congressional purpose of promoting concurrent development of the surface and subsurface estates for a significant category of land patented under land-grant statutes with general mineral reservations: land whose subsurface resources do not become commercially exploitable until some time after the issuance of the patent. In short, the reason that the "site-specific" theory is inconsistent with Western Nuclear is this: The essential basis for the holding that gravel is reserved to the United States is that it is not likely to be exploited by a farmer or stockman, and that is true regardless of whether the gravel could have been profitably extracted and sold at the time the patent was issued.

According to petitioners, the question whether a substance is reserved to the government under a land-grant statute like the SRHA or the Pittman Act should be analyzed the same way as the question whether a substance is locatable or patentable under the mining laws. Pet. Br. 18-22. But there is a fundamental difference

between the two questions. In the latter situation, the issue is whether a subsurface resource (or on public lands, an entire tract, see United States v. Coleman, 390 U.S. 599, 600, 603 (1968)) should be granted to someone who has an interest in exploiting the resource, so that making such a grant will lead to the exploitation of the resource if it can be profitably extracted at the time of the claim, but not otherwise. In the former situation, the issue is whether a subsurface resource should be granted to someone who does not have an interest in exploiting it, so that making such a grant is not likely to lead to the exploitation of the resource, whether or not it can be profitably extracted at the time of the patent.

As support for their theory, petitioners rely (Br. 23-25) on an opinion of the Solicitor of the Department of the Interior concerning the mineral reservation to the Northern Cheyenne Indian Tribe under a special statute, the Act of June 3, 1926, 44 Stat. 690. See Dept. of Interior, Division of Public Lands, Solicitor's Opinion, M-36379 (Oct. 3, 1956). The Solicitor's opinion offered no legal analysis in expressing the view on which petitioners rely, and because that opinion was rendered more than 25 years before Western Nuclear was decided, the Solicitor did not have the benefit of the decision in that case. Thus, insofar as the Solicitor's opinion could be read to suggest a retrospective, "site-specific" approach to statutes like the SRHA and the Pittman Act (which were

not mentioned in the opinion), it is inconsistent with Western Nuclear and should not be accorded any weight. Indeed, the Court in Western Nuclear relied on the Solicitor's opinion, but only to the extent that the opinion concluded that "gravel is a mineral" under a "federal land-grant statute[] that * * * reserve[d] all minerals to the United States." 462 U.S. at 56. The Court did not endorse the Solicitor's suggestion of a retrospective, "site-specific" approach. Rather, as the dissenting opinion noted, in this respect the Solicitor's opinion "took a much narrower view of what was included in the mineral reservation at issue there than the Court [did] with respect to the SRHA reservation." Id. at 68 n.11 (Powell, J., dissenting).[2/]

[2/] Petitioners cite no instance, and we are aware of none, in which the approach suggested in the Solicitor's opinion with respect to sand and gravel under the special statute allocating mineral interests between the Northern Cheyenne Tribe and its allottees was ever followed under the SRHA, the Pittman Act, or a similar statute of general applicability. In Western Nuclear itself, for example, the IBLA's conclusion that the gravel at issue was reserved to the United States did not turn on any determination that the gravel deposit could have been profitably mined at the time the patent was issued (see No. 81-1856 Pet. App. 45a-67a), and nothing in this Court's decision sustaining the government's position suggests such an approach. Petitioners cite (Br. 19-20 n.10, 33) statements in the government's brief in Western Nuclear that sand and gravel were reserved under the SRHA only if they are commercially exploitable. But the Court did not adopt that formulation. In any event, the thrust of the government's position was to distinguish deposits that were susceptible to extraction for commercial purposes from more minimal deposits or the use of deposits to support the ranching purposes of the patent. See 81-1856 Gov't Br. 17, 22-28; Reply Br. 8-16. And under the government's view, it was sufficient that the mineral deposit was capable of commercial use at the time the gravel was actually extracted for non-ranching purposes. See 81-1856 Reply Br. 2-7.

B. The Text And Structure Of The Pittman Act Demonstrate That Congress Did Not Intend A "Site-Specific" Approach

The text and structure of the Pittman Act confirm that its mineral reservation extends to valuable subsurface resources regardless of whether they could have been profitably extracted from the patentee's land at the time of the patent. Section 1 of the Act authorized the issuance of permits for the exploration of water on public lands that were "unreserved, unappropriated, nonmineral, [and] nontimbered," 41 Stat. 293 (Pet. App. 64a) (emphasis added), and Section 2 prohibited the issuance of a permit unless the Secretary of the Interior determined that the land in question was "of the character contemplated by this act," 41 Stat. 294 (Pet. App. 65a). Under Section 5 of the Act, a permittee could be granted a patent for a portion of the land if, within two years of the permit's issuance, the permittee discovered underground water capable of producing crops, and under Section 6, the remaining land was to be distributed under an earlier homestead law. 41 Stat. 294 (Pet. App. 66a). While the Act did not define the term "nonmineral" in Section 1, the "overwhelming weight of authority" at the time was that mineral lands were those that were "chiefly valuable for their deposits of a mineral character," Soderberg, 188 U.S. at 536-537, or, put differently, that were more

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There was no suggestion that it was necessary to look at some earlier point in time. See also n. 8, supra. There is no question that the gravel at issue in this case is reserved to the United States under that view.

valuable for their minerals than for agricultural use, Barden v. Northern Pac. R.R., 154 U.S. 288, 329 (1894); accord Western Nuclear, 462 U.S. at 46 n.7, 48 n.9.

The Pittman Act thus contemplated that, at the time a patent was issued, the Secretary of Interior would have made a formal determination that the land in question was more valuable for agricultural purposes than for the minerals it contained. And since the very reason that the Pittman Act made public lands available was that they had very little agricultural value (and would continue to have little such value until subsurface water was found), a "nonmineral" determination by the Secretary of the Interior meant, as a practical matter, that the land contained no valuable minerals. The fact that the Act nevertheless reserved to the United States all "coal and other valuable minerals" is strong evidence that the reservation encompassed subsurface resources that were unknown at the time of the patent or were known but could not be profitably removed until later. Otherwise, the reservation would apply only in the relatively rare case in which, between the date of the Secretary's "nonmineral" determination and the date on which the patent was issued, there was some economic, demographic or other development that gave value to previously valueless subsurface resources. It is highly unlikely that Congress intended the Pittman Act's broadly worded mineral reservation to have such a severely limited reach.

C. Petitioners' "Site-Specific" Approach Would Require Retrospective And Hypothetical Profitability Analyses

Petitioners' proposed interpretation of the mineral reservation would also create practical difficulties and uncertainties that Congress would not have intended to impose. Petitioners' submission is that the sand and gravel that they have been extracting are not "minerals" (or "valuable minerals") belonging to the government because, at the time the land was patented, the materials could not have been profitably removed and sold. There may be cases in which lack of value at the time of the patent is undisputed, or in which it can be easily established, so that a dispute over ownership of subsurface resources on land patented long ago could be resolved without much difficulty. This case may even be one of them. But there would likely be many cases in which the profitability question would be hard to answer, and even harder to answer with any degree of certainty.

To locate a mining claim and obtain a patent for mineral land under the mining laws, the applicant must ordinarily prove that the mineral exists "in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral," Chrisman v. Miller, 197 U.S. 313, 322 (1905) (quoting Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U.S. 394, 412 (1892) (Field, J., dissenting)), and that, by reason of "accessibility, bona fides in development, proximity to market, existence of present demand, and other factors," the

deposit can be profitably mined, removed, and sold, Western Nuclear, 462 U.S. at 58-59 n. 18 (quoting Taking of Sand and Gravel from Public Lands for Federal Aid Highways, 54 Interior Dec. 294, 296 (1933)). A claimant is typically able to satisfy this burden by exploring for and exposing minerals on the property and collecting verifiable geologic data about the quantity and quality of the substances that are discovered. See, e.g., 43 C.F.R. 3862.1-1(a) (application for patent should contain sufficient data to enable BLM to determine whether valuable mineral deposit exists). Under the approach that petitioners urge the Court to adopt, the government would presumably have the same burden of proving its entitlement to minerals reserved under the Pittman Act, or indeed under any similar law, such as the SRHA. In such a case, however, the government would have to prove that minerals that were exploited for the first time only recently in fact existed and were known to exist years or even decades earlier, and that a profit could have been made at that time if the minerals had been removed and sold. In attempting to make these showings, moreover, the government would be unable to present any contemporaneous data concerning the minerals, since they were not being removed or sold at the relevant time, and may not even have been known to exist.

Determining profitability can be complicated even when the question is profitability at the time the determination is made and there is available information about the removal and sale of

minerals from the deposit in question, or comparable ones, that were taking place at the relevant time. It is likely to be far more complicated when the question is profitability many years in the past and the mineral in question was first extracted from the deposit many years after the patent was issued. As between an interpretation of a mineral reservation that could require such a retrospective and hypothetical profitability analysis, on the one hand, and one that requires only a determination of whether the substance in question satisfies the definition of "mineral" employed in Western Nuclear, see 462 U.S. at 53, on the other, Congress should be presumed to have preferred the latter.

D. Under Petitioners' "Site-Specific" Approach, The Property Rights Granted To Similarly Situated Patentees Could Vary Depending On Conditions Over Which The Patentees Have No Control

Petitioners' "site-specific" theory should also be rejected because it could have the effect of treating similarly situated patentees differently, a result that Congress is not likely to have intended. Under the Pittman Act, every permittee who was able to discover water sufficient to raise crops on at least 20 acres of the permittee's land was entitled to the same benefit: "a patent for one-fourth of the land embraced in the permit," subject to "a reservation to the United States of all the coal and other valuable minerals in the land[]." Pittman Act §§ 5, 8, 41 Stat. 294, 295. The same is true, mutatis mutandis, of the SRHA, which granted an entitlement to a patent, subject to a reservation of all minerals

to the United States, to any entryman who made permanent improvements that increased the land's stock-raising value. See Western Nuclear, 462 U.S. at 38-39. Under petitioners' theory, however, similarly situated patentees could be granted different property rights, because the amount of property granted could vary depending upon conditions existing at the time of the patent that were beyond the control of the patentees.

Suppose, for example, that A and B, after making the statutorily required improvements, were issued patents under the same statute on adjoining parcels of land, each of which contained deposits of sand and gravel. A's patent was issued in the early 1930s, during the height of the Great Depression, when there was as yet no demand in the area for sand or gravel. B's patent was issued in the early 1940s, soon after the United States' entry into the Second World War, as a result of which there was demand for sand and gravel in the area for the first time. Under petitioners' theory, B is likely to have been granted land containing "minerals" (or "valuable minerals"), because there was a demand for sand and gravel at the time of his patent, and thus the sand and gravel under his land would belong to the United States. A, in contrast, is likely to have been granted land containing no "minerals" (or "valuable minerals") under petitioners' theory, because there was no demand for sand or gravel at the time of his patent, and thus the sand and gravel under his land would belong to him. As a

result, the government would have to pay A to extract the sand and gravel under his land for use in the war effort, but it could use the sand and gravel under B's land.

Or suppose that C and D were granted patents on adjoining parcels of land containing sand and gravel after making the improvements required by the statute. C's patent was issued in the late 1940s, at a time when there was no demand for sand or gravel in the remote area where the land was located. D's patent was issued in the early 1950s, a short time after uranium was discovered in the area. As a result of the discovery, the companies that mined the uranium, like the company in Western Nuclear, see 475 F. Supp. at 655-656, needed the sand and gravel for use in construction, and a demand for the materials accordingly arose for the first time. Under petitioners' theory, it is likely that C would own the sand and gravel under his land, but the government would own the sand and gravel under D's land.

There is no evidence in the legislative record that Congress intended to create a scheme of this type, under which two patentees who made the same improvements could be granted different property rights based on the geological, geopolitical, or other conditions that happened to exist at the time of the patent. And there is no reason why Congress would have intended that citizens would be rewarded for their efforts in improving public land in such an arbitrary manner.

E. Any Doubts About Whether Congress Intended A "Site-Specific" Inquiry Should Be Resolved In The Government's Favor Under The Interpretive Principle Requiring Narrow Constructions Of Land Grants By The United States

It is an "established rule" that "land grants are construed favorably to the Government," and that, "if there are doubts" about the scope of the grant, "they are resolved for the Government, not against it." Western Nuclear, 462 U.S. at 59 (quoting United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957)). Accordingly, if there are any remaining doubts about whether the Pittman Act requires a retrospective, "site-specific" determination of whether a substance is a "valuable mineral" reserved to the United States, that doubt should be resolved against petitioners. Contrary to the contention of petitioners' amicus that this canon "is not well suited for interpreting mineral reservations," NSSGA Br. 19, the Court has repeatedly relied on it as support for a broad interpretation of a statutory reservation of mineral rights.[10/] Indeed, there is particular reason for application of this principle here, because it dictates that no land be construed to

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[10/] See Western Nuclear, 462 U.S. at 59-60 (gravel is "mineral" reserved to government); Union Pac., 353 U.S. at 116 (reservation of "mineral lands" in section of statute granting railroad company "public land" extends to section of statute granting it "right of way"); Soderberg, 188 U.S. at 534 (lands valuable mainly for extraction of granite are "mineral lands" excepted from land grant). See also Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 617 (1978) (water is not "valuable mineral" locatable under mining law); Caldwell v. United States, 250 U.S. 14, 20-21 (1919) (grant of "timber" for construction of railroad does not grant railroad parts of trees not used for construction purposes).

pass "except what is conveyed in clear language." Western Nuclear, 462 U.S. at 59 (quoting Union Pac., 353 U.S. at 116). Even petitioners do not contend that there is clear language in the Pittman Act that grants, in addition to the surface estate, all subsurface resources that could not have been profitably extracted from the patentee's land at the time of the patent.[11/]

IV. WESTERN NUCLEAR SHOULD NOT BE OVERRULED

Petitioners contend that, if Western Nuclear is not distinguishable and a "site-specific" approach is not appropriate, then Western Nuclear should be overruled. Pet. Br. 48-50. See also AGCA Br. 11-13. That request should be rejected.

"[A]ny departure from the doctrine of stare decisis demands special justification," Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)), but there are two categories of cases in which the presumption against overruling a precedent is particularly strong. As this Court has frequently observed, stare decisis considerations are "most compelling" in cases involving a question of statutory

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[11/] Petitioners are mistaken in their contention that, unless their "site-specific" approach is adopted, ownership interests in patented land would "not be fixed at the time of the initial grant" and might "shift over time." Pet. Br. 23 (emphasis omitted). Under the approach employed by this Court in Western Nuclear and the court of appeals in this case, a patentee's property interests are in fact "at all times both determinate and determinable," ibid.: the patentee owns the surface estate and any subsurface resources that do not fall within the definition of "minerals" in Western Nuclear.

construction, Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 205 (1991), because "Congress is free to change this Court's interpretation of its legislation," Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). And stare decisis considerations are "at their acme" in cases involving property or contract rights, State Oil Co. v. Khan, 522 U.S. 3, 20 (1997), because in such cases "reliance interests" are at stake, Payne v. Tennessee, 501 U.S. 808, 828 (1991). Western Nuclear falls within both categories: it interpreted a statute that allocated property rights.

Since Western Nuclear was decided, Congress has had 20 years "in which it could have corrected [the Court's] decision * * * if it disagreed with it," but Congress "has chosen not to do so." Hilton, 502 U.S. at 202. The Court "should accord weight to this continued acceptance of [its] earlier holding." Ibid. During this 20-year period, moreover, both the government and private parties have made decisions in reliance on Western Nuclear's holding that gravel on SRHA lands belongs to the government. We are informed by the Department of the Interior that there have been hundreds of instances during this period in which private parties entered into a contract with the government for the right to extract gravel, sand, or a similar mineral (such as stone, pumice, limestone, or clay) from the subsurface estate of land patented under the SRHA (or, in a small minority of the cases, under a similar law). At the end of Fiscal Year 2003, there were more than 300 such

contracts in place, and under all the contracts issued since 1983, tens of millions of dollars were due to the government during that period.[12/] Overruling Western Nuclear would have the effect of voiding these contracts and transferring mineral rights from one set of private parties (those whom the government has granted a contractual right to the minerals) to another (the patentees or their successors). Overruling the decision could also have the effect of exposing private parties, including those whose contractual rights to the minerals have long since lapsed, to liability for at least a portion of the value of the minerals that were extracted in the past. Petitioners are thus mistaken when they say that "there will be no manifest injustice to private parties if Western Nuclear is overruled." Pet. Br. 48.

Petitioners are also mistaken in their suggestion that Western Nuclear "'stands as a significant departure' from prior cases." Pet. Br. 49 (quoting Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970)). On the contrary: At the time Western Nuclear was decided, the question "[w]hether gravel is a mineral for purposes of the SRHA" was "an issue of first impression in the federal courts." 462 U.S. at 42 n.4. Nor had this Court ever "had occasion to decide the appropriate treatment of gravel under the mining laws." Id. at 58.

12/ This information comes from the BLM's LR2000 database and is publicly available. See www.blm.gov/lr2000.

Petitioners' contention that Western Nuclear has "created * * * confusion" in subsequent cases, Pet. Br. 49, is equally without basis. Petitioners do not suggest that the decision has ever engendered a conflict in the circuits. And of the ten lower-court cases cited by petitioners that have been decided since Western Nuclear, see id. at 37-39 & nn. 18-19, three followed the decision in interpreting the SRHA;[13/] two distinguished it in interpreting a federal statute found to be materially different from the SRHA;[14/] four concluded that the decision did not apply because the case involved a question of state law;[15/] and the other case did not interpret Western Nuclear at all.[16/] That hardly amounts to a state of legal "confusion." Pet. Br. 49.

Petitioners' final contention is that Western Nuclear "was based on a clear misunderstanding of the meaning of the [SRHA]."

13/ See Rosette Inc. v. United States, 277 F.3d 1222 (10th Cir.) (geothermal resources), cert. denied, 537 U.S. 878 (2002); Hughes v. MWCA, Inc., 12 Fed. Appx. 875 (10th Cir. 2001) (scoria); Champlin Petroleum Co. v. Lyman, 708 P.2d 319 (N.M. 1985) (caliche).

14/ See United States v. Hess, 194 F.3d 1164 (10th Cir. 1999) (Indian Reorganization Act); Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676 (10th Cir. 1986) (Taylor Grazing Act).

15/ See Burkey v. United States, 25 Cl. Ct. 566 (1992); Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001 (Wyo. 1988); Rysavy v. Novotny, 401 N.W.2d 540 (S.D. 1987); Roe v. State ex rel. State Highway Dept., 710 P.2d 84 (N.M. 1985), cert. denied, 476 U.S. 1141 (1986), overruled, Bogle Farms, Inc. v. Baca, 925 P.2d 1184 (N.M. 1996).

16/ See Downstate Stone Co. v. United States, 712 F.2d 1215 (7th Cir. 1983).

Pet. Br. 49. At bottom, that contention rests on the premise that the Secretary of the Interior's 1910 decision in Zimmerman v. Brunson -- that land valuable for its sand and gravel deposits was not "mineral land" under a homestead law -- should have been "regarded as decisive on the issue of Congress' contemporaneous understanding of 'minerals.'" Id. at 43. See also NSSGA Br. 10. That premise is erroneous, because the Court correctly recognized in Western Nuclear that Zimmerman was not the only evidence of the meaning of the term "minerals" at the time the SRHA was enacted, and that much of the other evidence pointed in the opposite direction.

First, in 1903, this Court in Soderberg "adopted a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." 462 U.S. at 46.[17/] Second, in 1907, the Supreme Court of Washington held that limestone, clay,

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[17/] Petitioners contend that Soderberg is "an unlikely basis" for the view that gravel is a "mineral," in part because the decision "looked to the way that the Lands Department (i.e., Interior) treated granite and like materials." Pet. Br. 46-47. But the Court did not rely solely on decisions of the Department of the Interior in support of its "broad definition" (Western Nuclear, 462 U.S. at 46) of "mineral"; it also relied on the interpretive principle requiring that government land grants be narrowly construed and the treatment of the issue by state courts and English courts. See 188 U.S. at 534-536. In discussing the "rulings of the Land Department," moreover, the Court noted that those decisions had "almost uniformly" lent "strong support" to the view that "mineral lands" include "all lands chiefly valuable for other than agricultural purposes" and, in particular, that they include lands containing materials like limestone and building stone, id. at 534, which also could be regarded as "common minerals" like sand and gravel.

and similar substances fell within Soderberg's definition of "mineral," and in 1910, the Supreme Court of Oregon held that the definition covered building sand. Id. at 45 n.6 (citing State ex rel. Atkinson v. Evans, 89 P. 565 (Wash. 1907), and Loney v. Scott, 112 P. 172 (Or. 1910)). Third, despite the Department of the Interior's "specific ruling" in Zimmerman, its "general approach" was that land containing "common substances" could be classified as mineral land, and between 1881 and 1912, gypsum, building stone, and pumice were so classified by the Department. Id. at 46 n.7. Fourth, in 1913, three years after Zimmerman was decided and three years before the SRHA was enacted, in a "comprehensive study of the public lands," the Department of the Interior "listed gravel as a mineral," such that lands containing gravel deposits could be withdrawn or classified as mineral lands. Ibid.; see Bulletin 537, The Classification of the Public Lands, supra, at 138-142. Fifth, the 1929 Department of the Interior decision that overruled Zimmerman noted that the decision had been "vigorously criticized by leading text writers on the mining law," and had "disregarded on unsubstantial grounds" the settled "test of the mineral character of land." Layman v. Ellis, 52 Pub. Lands Dec. at 718, 721. Indeed, this Court noted in Western Nuclear itself that a "leading contemporary treatise" (published in 1914, before the SRHA and Pittman Act were passed) had pointed out that Zimmerman was "inconsistent with the Department's traditional treatment of the

problem." 462 U.S. at 46 n.7 (citing 2 C. Lindley, American Law Relating to Mining and Mineral Lands § 424, p. 996 & n.78 (3d ed. 1914)).

Under these circumstances, the Court in Western Nuclear cannot be said to have erred, and certainly cannot be said to have clearly erred, in finding no conclusive answer to the question whether gravel was generally understood to be a "mineral" in 1919. See 462 U.S. at 42-46. And petitioners raise nc serious challenge to the Court's consequent reliance on the purposes of the SRHA as a principal basis for its holding that gravel is a "mineral" reserved by that statute. See id. at 46-56.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In arguing that the worthless, common sand and gravel that comprised much of Newton and Mabel Butler's former property and the surrounding environs of the Nevada desert were reserved to the Government as "valuable minerals," Respondents do not take issue with many of the central points in Petitioners' opening brief. Respondents do not dispute that:

- The common understanding of "minerals" in the early 1900s, and at all times since, encompassed only mineralogical substances with value.
- Under the mining laws, common materials such as sand and gravel have always been fundamentally different from highly esteemed materials such as metals that have recognized inherent value in *all* circumstances (*e.g.*, gold, silver, copper). Unlike inherently valuable minerals, these ubiquitous materials, which are usually worthless, are not generally regarded as "valuable" and therefore have not generally been classified as "minerals."[1] Pet. Br. 19-21.
- Congress should be presumed to be aware of the official interpretations and decisions of the Department of the Interior when courts are called upon to interpret statutory terms involving the mineral laws administered by Interior. *See* Pet. Br. 44-46.
- Until 1929, Interior interpreted the term "mineral" under the general mining laws to exclude common sand and gravel categorically. Such materials therefore were not regarded as "minerals" that could be located and exploited

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[1] Respondents do *not* adopt the Ninth Circuit's theory that anything that may be *useful* is "valuable." *See* Pet. Br. 14 n.5.

under the mining laws even where they were commercially marketable. *See* Pet. Br. 17-18, 36.

- After 1929, and until common materials were excluded from the mining laws by statute in 1955, Interior interpreted "mineral" to include common materials such as sand and gravel *only if the material at the site in question had commercial utility* due to proximity to an existing market. Until its relatively recent assertion of ownership to common materials under statutory mineral reservations, the Department has never taken the position that *all* sand and gravel are "minerals" or "valuable minerals."

- What is included within the term "valuable minerals" in a Pittman Act reservation must be fixed and determinable – as with all interests in land – at the time of the patent. Materials reserved to the United States do *not* change over time after the conveyance depending upon market conditions (*i.e.*, materials that first become valuable after the conveyance do not then become reserved "valuable minerals.") *See* Pet. Br. 22-25.

- The sand and gravel on BedRoc's Nevada desert land and in the surrounding environs had no commercial value at the time of the Butlers' 1940 patent. For that reason, at the time of the patent and for decades thereafter, those materials could not have been exploited as minerals under the mining laws. *See* Pet. Br. 3.

- *Watt v. Western Nuclear*, 462 U.S. 36 (1983), did *not* decide the central question presented by this case: whether common materials that were actually worthless at the time of the patent were reserved as valuable minerals. *See* Pet. Br. 33; Resp. Br. 34.

Ultimately, Respondents simply hitch their wagon to *Western Nuclear* and insist that any requirement of site-specific value in the identification of "valuable minerals" is inconsistent with that decision. This argument should be rejected for the following reasons.

I. Sand And Gravel Are Not Generally Valuable Minerals And Were Not Generally Valuable Minerals At The Time Of The Butler's Patent.

As set forth in Petitioners' opening brief (at 13-25), common English language usage in the early 1900s (and now) would not have allowed ordinary sand and gravel of the Nevada desert to be regarded as "valuable minerals." The adjective "valuable" is appropriate only for materials that are generally esteemed and have value, such as metals possessing well-recognized inherent value (*e.g.*, gold, silver, copper). It contradicts ordinary usage to categorize common, abundant, and typically worthless earthen materials as "valuable minerals."

Moreover, Interior has never, in its official opinions, deemed sand and gravel generally to be "minerals" under the U.S. mining laws. Interior did not regard such common materials to be minerals *at all* until 1929 and did so thereafter *only* where, by reason of proximity to market, those substances had commercial value at the site in question.

1. Respondents argue that Congress considered "minerals" and "valuable minerals" to be synonymous and used them interchangeably, positing that "valuable" (as used in the phrase "valuable minerals") adds nothing because a material must be valuable to be considered "mineral" at all.[2] Resp. Br. 26-27. This argument is correct

[2] Respondents cite a House Report to the effect that the Pittman Act reservation was intended to be of the same scope as that in the Stock-Raising Homestead Act of 1916, the statute at issue in *Western*

(Continued on following page)

in one sense: As Petitioners explained in their opening brief, Interior has consistently required that a material be recognized as valuable to be considered a mineral under the mining laws. But while Interior's definition of "minerals" incorporated the element of "value," Interior has also consistently recognized that any "value" of common materials can arise only from site-specific circumstances. Interior did *not* regard sand and gravel as mineral at all prior to 1929 and later only regarded such substances as mineral if they were commercially valuable *where located*. Respondents cannot have it both ways: if Respondents wish to adopt the accepted view under the mineral laws that minerals must be "valuable," they must also acknowledge how value has been defined for common materials under those laws.

At the very least, Congress' explicit use of the word "valuable" emphasizes that "value" is important to defining the scope of the reservation. Whereas the Stock-Raising Homestead Act of 1916 ("SRHA") did not contain the word "valuable" and thus did not expressly dictate consideration of "value" by the Court in *Western Nuclear*, the same cannot be said of the Pittman Act.

2. Respondents suggest that Congress did not care about the word "valuable," as evidenced by its purportedly arbitrary use of the adjective in Pittman Act Section 8. Resp. Br. 17, 26-27. Respondents' assertion is belied by the text. Congress defined what was reserved to the United States in the initial two sentences of that Section, using the word "valuable." Having stated the qualification, it did not need to repeat the qualifying adjective in each subsequent reference to "minerals" and "mineral deposits."

Nuclear. Resp. Br. 28. Provided that the Pittman Act reservation is properly construed in accordance with its plain text, Petitioners, of course, have no objection to construing the reservations of both Acts to have similar breadth.

3. As did Petitioners, Respondents emphasize one common, traditional definition of "mineral" as "mineralogical substances that can be extracted from the earth and that have independent value distinct from the surrounding earth." Resp. Br. 26. That definition does not help Respondents here. When one extracts gold, silver, copper, and a host of other substances, the extracted material is valuable; it can be sold for a price. But when one extracts common sand and gravel and the like, one might (except in unusual circumstances) just as well toss those substances back onto the earth, for they are worth nothing. Thus, most such materials are not "minerals" because they have no "independent value distinct from the surrounding earth."

4. Respondents oppose any site-specific inquiry, insisting that "valuable minerals" must be defined categorically. Rather than endorse a categorical definition consistent with the typically worthless nature of common materials, however, Respondents argue that *any* mineralogical material is a "mineral," and therefore a "valuable mineral," if substances *of that kind* (*e.g.*, sand, gravel, clay, or common rock) *can be* – under some circumstances, somewhere – used for commercial purposes. Resp. Br. 30-32, 34, 38-39. In Respondents' view, it bears no consequence that the amount of sand or gravel that is *actually* susceptible to commercial use is infinitesimally small compared to the universe of such material that is, and always will be, completely worthless. *See id.* at 34.

Respondents' view turns common English usage upside down. Materials that are almost always *not* valuable, but that are, on rare occasion, of some value, would not be generally characterized as "valuable minerals." Any reasonable common understanding of "valuable minerals," including Interior's own, includes only materials that are generally (*i.e.*, typically) valuable. It might even be possible to squeeze within the class of "valuable minerals" specific common materials (*e.g.*, particular gravel deposits) that *actually* have value. But it is impossible to squeeze in

the entire universe of such materials when they are usually utterly worthless.

5. Respondents' position in this case is inconsistent with multiple official statements of position by Interior on the treatment of sand and gravel under the mineral laws. Respondents cite no Interior opinions in support of their position.

As demonstrated in Petitioners' opening brief, Interior had, in a series of decisions antedating enactment of the Pittman Act, categorically *excluded* sand and gravel (and similar common materials) from the definition of minerals. *See* Pet. Br. 17-18 & n.9; *id.* at 41-42 & n.21. Later, in 1929, the Department expanded the definition of minerals to include gravel, but *only* if valuable *at the site in question*. *See Layman v. Ellis*, 52 Pub. Lands Dec. 714, 721 (1929). Knowledge of such contemporaneous decisions of the federal agency charged with administering the statute at issue would ordinarily be imputed to Congress and given decisive weight in the interpretation of statutory terms. *See* Pet. Br. 44-46 (citing *Traynor v. Turnage*, 485 U.S. 535 (1988), and related cases).

Respondents cannot and do not dispute either: (1) that their current theory is inconsistent with Interior's interpretation of "minerals" at the time of the Pittman Act, and even with its later interpretation; or (2) that those interpretations ordinarily would and should, under well-accepted legal principles, be given decisive weight in resolving this dispute.

a. Respondents observe that "this Court noted in *Western Nuclear* itself that a 'leading contemporary treatise' (published in 1914, before the SRHA and Pittman Act were passed) had pointed out that *Zimmerman* [*v. Brunson*, 39 Pub. Lands Dec. 310 (1910)] [which held that sand and gravel were categorically excluded from mineral status] was 'inconsistent with the Department's traditional treatment of the problem.'" Resp. Br. 49 (citing *Western Nuclear*, 462 U.S. at 46 n.7 (citing 2 C. Lindley, *American Law Relating to* [*Mines*] *and Mineral Lands*

§ 424, at 996 & n.78 (3d ed. 1914))). Respondents are wide of the target, however, in suggesting that this Court's citation and crediting of the Lindley treatise in *Western Nuclear* helps them here. Lindley did mildly criticize *Zimmerman* as inconsistent with Interior's traditional approach for minerals, but also noted the dispositive weight of Interior's views: "[A]s the land department is the only tribunal which has the power to determine the character of land, it has the undoubted privilege of making exceptions to general rules, and the courts cannot interfere with the exercise of this prerogative." Lindley, *supra*, at 996-97. More importantly, the traditional rule favored by Lindley employed a *site-specific approach* under which materials would be deemed mineral where they were, at the site, commercially marketable. *See id.* at 996 ("marketability at a profit is the test of the mineral character of a given tract of public land"). It was this site-specific rule that Interior later adopted for sand and gravel in 1929 – and that is precisely the rule that Petitioners seek here and that Respondents now repudiate. Neither Lindley nor any other American source has endorsed the rule that Respondents advocate here: that because common earthen materials might sometimes be useful and marketable in some circumstances, such substances are *always* deemed "valuable minerals."

b. As set forth in Petitioners' Brief (at 24), Interior's Solicitor explained in 1956 in connection with a similar, but broader, mineral reservation that:

> Deposits of sand and gravel . . . which can be shown as of the date of the allotment or patent to have definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

Op. Solic. Interior Dep't M-36379, at Summary (1956).

Respondents dismiss the Solicitor's Opinion, arguing it contains "no legal analysis" in requiring site-specific value at the time of patent. Resp. Br. 36. Yet, the site-specific approach had long been employed by Interior, as

this Court recognized in *Western Nuclear*. *See* Lindley, *supra*, at 996; *Western Nuclear*, 462 U.S. at 58 n.18 (noting "in the case of nonmetalliferous substances such as gravel, the Secretary [of Interior] has required proof that 'by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit") (citations omitted).[3]

If Respondents' objection to the Solicitor's Opinion is based on its explicit requirement that "value" be found "as of the date of the allotment or patent," then Respondents' objection is even more peculiar. That conclusion was implicit in Interior's approach from the outset and would be essential in any case because the scope of a conveyance must be determined at the time of conveyance. Indeed, Respondents concede that the time of patenting is the relevant time for determining the interests conveyed.[4] Resp. Br. 44 n.11.

Finally, Respondents say that the 1956 Solicitor's Opinion requiring a site-specific analysis of value at the time of patent "should be accorded no weight" because the Solicitor did not have the benefit of this Court's ruling in *Western Nuclear* and the Opinion is "inconsistent with

[3] This was also consistent with the position of the United States itself in *Western Nuclear*. *See* Brief for Petitioners, No. 81-1686, Argument § II.A.2.

[4] That some substances such as precious metals might not be known to exist at a site, or might not be extractable at a profit at the time of patent, presents no conceptual problem. Intrinsically valuable materials have always been treated differently than common materials and recognized as valuable wherever they are found. *See* Pet. Br. 20-21. Certainly Interior has had no difficulty drawing that distinction. The rule Petitioners advocate here, consistent with Interior's practices and historic understandings under the mineral laws, applies only to common materials.

Western Nuclear." Resp. Br. 36. Yet Petitioners demonstrated, and Respondents now agree, that *Western Nuclear* did *not* address these questions at all. *See* Resp. Br. 34. And inasmuch as *Western Nuclear* cited and relied upon Interior's emphasis on value, that decision is fully consistent with the Solicitor's determination that the mineral status of sand and gravel depends on the value of the sand and gravel at the site in question at the time of the patent. Moreover, *Western Nuclear* itself cited the 1956 Opinion approvingly, as did the Tenth Circuit recently in resolving a question similar to that presented here. *See United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003). Not surprisingly, Interior has never overruled the 1956 Solicitor's Opinion in any subsequent Departmental ruling.

6. On the one hand, Respondents disdain, and urge the Court to disregard, official Interior decisions specifically addressing the matters at issue here. On the other hand, they seek support for their position that Congress viewed sand and gravel as categorically "valuable" in the early 1900s from reports of the U.S. Geological Survey ("U.S.G.S."), a subordinate scientific agency within the Interior Department. Resp. Br. 30-32.

That U.S.G.S. tracked sand and gravel production in monitoring mineral resources of the United States does not mean that sand and gravel were regarded as "valuable minerals" under the mining laws or statutory mineral reservations. U.S.G.S. had quite a different purpose in compiling information about mineral resources in the United States. In *Mineral Resources of the United States 1918, Part I-Metals*, 4A (1921), for example, U.S.G.S. pointed out that "investigation of the mineral resources of the United States . . . includes *every known raw mineral product and commodity of economic value* and anticipates future development by including *some rocks and minerals that are of no present economic value* but that may be valuable in the future." (Emphasis added.) In addition to covering common sand and gravel, the U.S.G.S. reports included "clay products" such as "common brick" with "low

value preventing transportation for any considerable distances." *Id.*, *Part II-Nonmetals*, 858. U.S.G.S. noted that "[c]lay available for the manufacture of clay products is one of the most widely distributed minerals. Hence there are clay-working plants in every State in the Union." *Id.* at 906. *See also* U.S.G.S., *Mineral Resources of the United States 1916, Part II-Nonmetals*, 511-12 (1919). That substances such as common clay could be classed as "mineral resources" for purposes of broad economic surveys says nothing about how such substances were classed with respect to the public land and mining laws. As with sand and gravel, most such common clay materials, in most locations, were worthless. And like sand and gravel, most such materials could not be classified as "minerals" under the mining laws under settled Interior precedent in the early 1900s and since. *See* Pet. Br. 17-18 & n.9; *id.* at 42 & n.9.

Even the 1917 *Mineral Resources* report (not published until 1920), quoted liberally by Respondents to show increased war-time use of sand and gravel, described sand and gravel as a "common and cheap building material" that was "widely distributed . . . [and] abundant . . . in the United States." Resp. Br. 31. Congress did not have in mind these "common and cheap" materials when it reserved "valuable minerals" under the Pittman Act.

Respondents also cite a 1913 U.S.G.S. bulletin (also cited in *Western Nuclear*) for the proposition that gravel was listed as a "mineral" and that "lands containing gravel deposits *could* be withdrawn or classified as mineral lands." Resp. Br. 49 (emphasis added). Yet, the scant treatment of sand and gravel in this comprehensive study confirms that such substances were *not* regarded as "valuable minerals." In a brief section on "Miscellaneous Nonmetalliferous Mineral Lands," the report listed "limestone, . . . glass sand, gravel, volcanic ash, . . . and other clays, fuller's earth, mineral waters, . . . " and other common earthen substances. U.S.G.S., *Bulletin 537, The Classification of the Public Lands*, 138 (1913). The report

stated, however, that "no withdrawals and no formal classifications of lands because of their content of any of these minerals have been made." *Id.* at 142 ("*Sand, for example, is of great use but it is so common that in most localities it has almost no market value.*") (emphasis added).

7. Because land grant statutes such as the Pittman Act sought to induce citizens to act and invest, courts should interpret their mineral reservations in accordance with the "condition of the country when the acts were passed." *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979). An *unexpressed* congressional purpose ought not be allowed to trump the "ordinary and popular" meaning of the words used to induce citizen action. *See* Pet. Br. 26. *Leo Sheep*, of course, provides direct support for that logical and responsible approach to the construction of mineral reservations in land grants.

Respondents purport to distinguish *Leo Sheep* on the theory that it involved grants to railroads (Resp. Br. 21 n.2), but they offer *no* explanation why railroads should be peculiarly favored over industrious citizen-settlers who found water in the desert for the benefit of all. *Leo Sheep* itself makes clear that the crucial factor requiring consideration is the *inducement* of citizens (or railroads) to sacrifice in consideration of the patent's plain terms. 440 U.S. at 683, 687. To deny the landowner the benefit of the most reasonable interpretation of the reservation is to deny the benefit of the bargain and sacrifice made in securing the patented land.

Respondents highlight that *Western Nuclear* construed the SRHA reservation broadly, ignoring the teaching of *Leo Sheep*. Resp. Br. 21 n.2. In that respect as well, then, *Western Nuclear* is deficient. Perhaps the *Western Nuclear* majority did not deem the level of sacrifice required of SRHA patent recipients, settling and improving agricultural land in return for title to the land, to be worthy of weighty consideration. Such consideration is nevertheless due to Pittman Act water prospectors. The

prospectors' investment in labor, capital, and self-sacrifice to find and develop subterranean water sources in Nevada's sand and gravel desert was great. The risk of failure and financial loss was high (if water was not found and developed – or possibly even if it was). Yet the public benefits from this sacrifice, if water was found, could be enormous. Having induced prospective patentees to invest their capital and energy, at considerable personal risk, based on the plain words of the Act and the patent, there is no just reason to deny successful prospectors the very ground and grit that they sacrificed to earn.

In any event, *Leo Sheep* lives, as evinced by this Court's recent decision in *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873 (1999) (directing that the terms of a patent be taken in "their ordinary and popular sense"); *see also id.* at 875 (relying on *Leo Sheep*). Indeed, Interior Secretary Gale Norton recently approved an opinion of Interior's Solicitor relying on *Leo Sheep* in a mining law controversy that did not involve a grant to a railroad. In construing provisions of the Mining Law of 1872, as amended, in favor of mining claimants and patentees, the Solicitor relied upon *Leo Sheep* in stating that "the Supreme Court has construed certain federal land grants more broadly when the purpose is to secure public advantages by inducing individuals to engage in costly operations on public lands." Op. Solic. Interior Dep't M-37010, at 13 (2003) ("Mill Site Location and Patenting under the 1872 Mining Law").

8. Respondents cite practical concerns that they say militate against a "site-specific" approach. They worry that while this case may be an easy case for applying the site-specific approach, there may be difficulties in other cases. Resp. Br. 39. But Respondents' apprehension is unwarranted. The plain fact is that if gravel was marketable at the time of a patent, there will be evidence of the market. With respect to Pittman Act patents, of course, Interior had to certify that the lands were *not* mineral lands (*i.e.*,

not chiefly valuable for mineral purposes) even to be eligible for the grant.[5]

9. Respondents also gin up hypothetical scenarios in which one landowner owns the sand and gravel on his property (because patenting occurred when there was no market for sand and gravel), but an adjoining land owner, who acquired his plot later, when sand and gravel were marketable, would not. Resp. Br. 41-43. Different treatment of such differently situated land holders is not surprising at all, however, given Congress' desire to prevent the fraudulent acquisition of valuable minerals known to the entryman under the "guise" of agricultural entry. *See* Pet. Br. 30 (citing 53 Cong. Rec. 705, 707 (1916) (comments of Sen. Pittman)). Respondents' proposed Solomonic solution to the problem of unequal treatment of patent holders – treating all settlers equally poorly by granting none ownership of the sand and gravel that comprise their land – is a solution few landowners would find fair. If uniformity is a dominant concern, the uniform rule should be the one in force contemporaneous with the Pittman Act (and that recognizes that in the early 1900s virtually all Nevada sand and gravel were worthless): sand and gravel were not reserved at all.

II. *Western Nuclear* Ought Not Be Extended To Reach The Issues In This Case.

As Respondents concede, *Western Nuclear* did not address the "site-specific" issue. Resp. Br. 34. Yet *Western*

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[5] "Nonmineral" designation signifies lands "chiefly valuable" for uses other than mineral production, such as agriculture. *See N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 536-37 (1903). Because the Pittman Act required designation of the land as nonmineral before the issuance of permits to prospect for water, the land in question had no existing value for agricultural use and known "valuable minerals" would preclude nonmineral designation.

Nuclear's reliance on Interior's historic site-specific approach to common materials – and the Government's focus on "commercially exploitable" gravel in the briefs in that case – certainly suggest that Petitioners' position here is consistent with *Western Nuclear*.[6] Indeed, even the Court's citation to the Lindley treatise in *Western Nuclear*, which supports a site-specific marketability test for common materials, suggests that the Court's primary focus was on rejecting the assertion that *no* gravel was reserved (even admittedly valuable deposits).

Respondents nonetheless assert that the *reasoning* of *Western Nuclear* requires rejection of "the 'site-specific' theory." The centerpiece of this argument for a categorical reservation of all sand and gravel is "Congress' purpose." Resp. Br. 33-39.

The first difficulty with Respondents' argument, of course, is that, before delving into the world of legislative purpose, one must first overcome the plain language of the statute and ordinary principles of statutory construction. In particular, as explained in cases before and since *Western Nuclear*, the publicly stated views of the responsible federal agency must be given great weight and knowledge of those views imputed to Congress when discerning the meaning of the words of the statute.

Moreover, on its own terms, Respondents' argument (at 34-39) about Congress' narrow agricultural purpose does *not* support the result they seek here. Respondents postulate that Congress sought to provide patentees with the right to engage in agricultural pursuits only, while severing a broad mineral estate (including common

[6] *Western Nuclear* drew heavily from Interior decisions and mining law authorities describing which common materials could be developed as "minerals" under the mining laws. 462 U.S. at 45-59. In fact, the Court itself relied (for a different proposition) on the 1956 Solicitor's Opinion that the Government now urges the Court to dismiss as irrelevant. *Id.* at 56.

earthen materials) to be exploited by third parties under the control of the Government. *Id.* at 34-35. Yet, as we have detailed, unless common materials such as sand and gravel were *actually marketable* at the site in question, they would *not* be recognized as "mineral" and thus would *not* be exploitable under the mining laws. Pet. Br. 18, 22-25.[7] And if future marketability later rendered such common materials exploitable by third parties, such exploitation would almost certainly destroy the interest purportedly granted to the "surface owner."

Furthermore, *Western Nuclear* characterized the SRHA as a statute under which the settler received a bare surface estate in exchange for a modest investment in establishing an agricultural use. The Pittman Act required more. It required the discovery and development of subterranean water sources in Nevada's sandy desert – thus opening for *other settlers* hundreds of additional acres outside the patentees' own holdings. *See* Pet. App. 64a, 66a (Act authorizing permits to prospect for water on up to 2,560 acres, up to one fourth of which could be patented to successful prospectors, with the remaining acreage subject to disposal under the homestead laws). The goal was to develop the single natural resource – water – that was essential to *any* future population and economic use (including agricultural use) of these desert lands. Pittman Act patent holders – and, frankly, SRHA patent holders as well – were not to be agricultural serfs on the land they purchased through their labors. If they were to *own* the

[7] Given the ubiquitous nature of materials like sand, gravel, and clay – most of which are, have always been, and will likely always be, worthless – the Government must presume that Congress intended to categorically deny Western patentees ownership of what appeared to be their land – the very soil and substance on which they walked – even while anticipating that little or none of that soil and substance would *ever* be eligible for development under the mining laws.

land, they surely must own the common material comprising much if not most of the land surface itself.

Finally, the purpose of the Pittman Act's mineral reservation was not as broad as Respondents conceive. Because the Pittman Act – unlike the SRHA – was limited to lands designated "nonmineral" by the Interior Department, the primary purpose of its mineral reservation was to prevent the fraudulent acquisition of valuable minerals known to the entryman but unknown to the government. 53 Cong. Rec. 707. According to Senator Pittman:

> If [minerals] are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of coal or other valuable minerals that are apparently concealed under the surface, *but are known to the entryman.*

Id. (cited at Pet. Br. 30) (emphasis added). Concerns about deceptive acquisition have no rational relationship to obviously present sand and gravel that were worthless at the time of patent, and Respondents make no attempt to link that purpose with the question presented here.[8]

[8] The photographs and affidavits of record show the obvious presence of these surface materials. JA 10, 13-15. Respondents now suggest in passing that the sand and gravel were not evident on the surface of the Nevada desert at the time of patenting. *See* Resp. Br. 6. Suffice it to say that there is no finding in the record on the point because the district court found "irrelevant BedRoc's and Williams' strenuous claims that the sand and gravel were exposed, rather than subsurface, deposits." 50 F. Supp. 2d 1001, 1008 n.1 (Pet. App. 35a n.1). The record bears out BedRoc's position.

III. If *Western Nuclear* Cannot Be Reconciled With The Correct Result In This Case, *Western Nuclear* Should Be Overruled.

As set forth above, the term "valuable minerals" under Pittman Act patents does not reach common materials, such as sand and gravel, that were worthless at the time of the patent. Although Petitioners see no necessity for this Court to reach the issue here, Petitioners generally agree that a "site-specific" approach to common materials could just as well apply to SRHA reservations as to Pittman Act reservations. *See* Resp. Br. 24. *Western Nuclear* did not address the issue.

If it is true, however, as Respondents suggest, that accepting a "site-specific" approach in this case would fundamentally contradict the reasoning of *Western Nuclear*, then *Western Nuclear* should give way. There is no reason to reach the wrong result here merely to bolster and extend *Western Nuclear*.

As set forth in Petitioners' opening brief, *Western Nuclear* is an orphan in its analytic approach to the meaning of "minerals" in a mineral reservation. Many cases before and since have properly and heavily relied on the contemporaneous decisions of the responsible federal agency in interpreting a statute such as this, which *Western Nuclear* declined to do.[9] *See* Pet. Br. 36-39.

[9] Respondents rely upon two state-court decisions concerning the meaning of the term "minerals." The first, *State ex rel. Atkinson v. Evans*, 89 P. 565, 566 (Wash. 1907), concerned a state constitutional provision restricting property ownership by aliens, but providing an exception for lands containing "valuable deposits of minerals, metals, iron, coal, or fire clay. . . ." The court held that lands containing "valuable deposits of limestone, silica, silicated rock, and clay . . ." could be held by the alien resident. *Id.* at 568. The second, *Loney v. Scott*, 112 P. 172 (Or. 1910), was an ejectment action against a placer mining claimant seeking title

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Moreover, decisions like *Leo Sheep* before, and *Amoco Production* after, have taken the words of a reservation in the "popular and ordinary" sense (and have not strained for an interpretation favorable to the Government) out of deference to the sacrifice and investment of citizen-patentees.

In short, the foundations of *Western Nuclear*, shaky at the outset, may well crumble under renewed scrutiny. This case presents the Court with an opportunity to provide a sounder footing upon which to construct a broadly applicable rule for the treatment of ubiquitous, common materials under statutory general mineral reservations. If that requires overruling *Western Nuclear*, then that outcome is assuredly preferable to *extending Western Nuclear* to reserve all common materials under all such statutes.[10] In

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from Interior under the federal mining laws. Although the Oregon court said that the definition of mineral lands "*seems* broad enough to include building sand," *id.* at 175 (emphasis added), that statement was not necessary to the ruling, because the mining claimant also had alleged that the land in question contained "large deposits of building sand and *placer deposits of gold*." *Id.* at 173 (emphasis added). Interior's ruling in *Pac. Coast Marble Co. v. N. Pac. R.R. Co.*, 25 Pub. Lands Dec. 233 (1897), cited by Respondents (Resp. Br. 23), is also of no help to their cause. That decision, holding that valuable marble of "superior quality" was locatable, was eminently sound and in no way indicates that common sand and gravel were valuable.

In any event, the majority of courts considering general mineral reservations in a variety of contexts have concluded that they do not include sand and gravel. *See* Pet. Br. 37 & n.18. This remains true of *Roe v. State*, 710 P.2d 84 (N.M. 1985), *cert. denied*, 476 U.S. 1141 (1986), *overruled in part by Bogle Farms, Inc. v. Baca*, 925 P.2d 1184 (N.M. 1996) (holding merely that courts interpreting general mineral reservations may not discount the parties' *mutual intent*).

[10] Respondents suggest that private reliance interests will be upset on SRHA lands if this Court overrules *Western Nuclear*. No private parties seem to think so, as evidenced by the amicus briefs filed by many diverse private interests in this case uniformly urging that

(Continued on following page)

State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997), for example, cited by Respondents (at 45), a unanimous Court overruled its 1968 decision in a case involving statutory interpretation, while acknowledging that *stare decisis* concerns involving "property and contract rights" arguably were relevant. The Court noted that *stare decisis* is "not an inexorable command" and observed that the Court has been willing to reconsider decisions involving statutory interpretation "when the theoretical underpinnings of those decisions are called into serious question." *Id.* at 20-21. Where the Court has confronted its prior precedent directly and found "its conceptual foundations gravely weakened . . . ," it has properly overruled that precedent. *Id.* at 22. If this Court chooses – upon Respondents' insistence that *Western Nuclear* is controlling here – to confront the theoretical underpinnings of that decision, it may properly determine that *Western Nuclear* should not stand.

Western Nuclear be overruled. The Government's representations about private contracts are vague and not substantiated by the BLM website it relies upon to support its representations. Even the Government's estimate that "more than 300 such contracts" are in place raises little concern, as this would implicate *less than two-tenths of one percent* of the more than 165,712 SRHA land patents issued comprising more than 70.3 million acres of SRHA-patented lands. *See* U.S. Dep't of the Interior, BLM, *Public Land Statistics 1983*, at Table 20 (1984). Moreover, any gravel extraction contracts were almost certainly entered into with the landowners themselves (the "surface owners"), their lessees, or parties otherwise in privity with the landowners, so that eliminating the Government's burdensome royalty and regulatory role will not be disruptive to these private parties. Notably, the Government makes no claim that any contracts are in place regarding Pittman Act lands.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, COLORADO CONTRACTORS ASSOCIATION, MONTANA CONTRACTORS ASSOCIATION, WYOMING STOCK GROWERS ASSOCIATION, AND WYOMING STOCK GROWERS AGRICULTURAL LAND TRUST IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 ("Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials) that were worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule that *all* sand and gravel was reserved on land patented by the federal government in the early 20th century, whether congressional intent would be better served by a rule that such common materials were *not* reserved to the government as "valuable minerals."

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INTERESTS OF AMICI CURIAE[1]

The Associated General Contractors of America ("AGCA") is the largest and oldest of the national trade associations in the construction industry. It is a non-profit corporation formed in 1918 at the request of President Woodrow Wilson. AGCA represents more than 33,000 firms in more than 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 14,000 material suppliers and service providers to the construction industry. AGCA has two chapters and approximately 700 members in Nevada, the state in which this case arose.

AGCA's members engage in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, and multi-family housing units, and they prepare sites and install utilities necessary for housing development. Their projects require and consume vast quantities of sand and gravel and they therefore have a great and continuing interest in the cost and availability of these materials. A significant number of AGCA members also extract sand and gravel on western and other lands. In some instances, these construction contractors are simply self-supplying the materials they need for their projects. In other cases, they also supply sand and gravel to other contractors.

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

AGCA seeks to ensure that construction contractors can efficiently support the physical infrastructure on which all Americans are heavily dependent for their quality of life. To that end, the association's bylaws require it "to promote fair and honorable dealings with the owners of construction projects ... and with all segments of the construction industry, including architects, engineers, specialty and subcontractors, and suppliers of materials and services."

AGCA's members have found that the cost of transporting sand and gravel is extremely high. Whether a construction project is cost-effective may therefore depend in large part on whether construction contractors can produce or purchase these materials relatively near the project. Where neither sand nor gravel, nor other aggregate, is available at reasonable prices, less infrastructure is likely to be built.

As an *amicus curiae*, AGCA frequently participates in nationally significant cases in state and federal courts, including the Supreme Court. It recently appeared before this Court as an *amicus* in *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001). AGCA also appeared before this Court as an *amicus* supporting the petition for certiorari in this case.

The Associated General Contractors of California ("AGCC") is the AGCA chapter for most of the State of California. AGCC is an independent but affiliated trade association of construction contractors and related firms (including sand and gravel producers) committed to skill, integrity, and responsibility in the improvement of our physical environment. Founded in 1920, AGCC represents more than 1,100 firms, including general contractors, specialty contractors, material suppliers, and other businesses serving the construction industry in California.

AGCC is the voice of California's construction industry, and is committed to improving the performance of its members and the construction industry as a whole, which of necessity includes the procurement of essential materials such as sand and gravel. AGCC members operate in California, as well as in nearby western states such as Nevada. AGCC participated as part of an *amici curiae* coalition supporting this Court's review of this case.

The Associated General Contractors of Alaska ("AGCAK") is a non-profit construction trade association consisting of general contractors, subcontractors, and industry professionals dedicated to improving the professional standards of the construction industry. The AGCAK has been a significant part of the construction industry in Alaska since its establishment in 1948.

The Colorado Contractors Association, Inc. ("CCA") is Colorado's premier construction group. It was established in 1933 and is comprised of more than 370 firms including many second and third-generation family-owned construction businesses. CCA's member base also includes construction support businesses such as financial, insurance and bonding, materials supply, and heavy equipment companies.

The Montana Contractors Association ("MCA") is an association dedicated to being the leader of Montana's construction industry, promoting economic viability by providing complete services to members, including a competent workforce and enhanced image, privatization, and economic development. MCA provides services to its members, promoting profitable business relationships while actively addressing public policy issues affecting contractors, responsibly serving Montana's public needs with integrity.

The Wyoming Stock Growers Association ("WSGA") is a private, non-profit organization established in 1872 for the purpose of protecting and promoting the interests of the livestock industry. Many of WSGA's members own private lands subject to federal mineral interests, and a majority who are patentees or successors-in-interest to patentees under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291 *et seq.* (1976). The mission of WSGA is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, customary, and cultural interests.

The activities of WSGA include: advocating on issues affecting the cattle industry, agriculture, and rural community living of Wyoming; providing members with education regarding beef production, resource management, and policy development, and timely information regarding events in the cattle industry and the activities of the association; and promoting the role of the Wyoming cattle industry in resource stewardship, animal care, and the production of high-quality, safe, and nutritious beef. WSGA also works to inform and educate the public regarding the role of the cattle industry. All of these activities are grounded in the cattle industry's productive and valuable use of private lands that are in many cases affected by federal mineral interests and potentially at grave risk from unwarranted extensions of those interests at the hands of the U.S. Department of Interior. WSGA participated as *amicus curiae* before this Court in *Watt v. Western Nuclear*, 462 U.S. 36 (1983).

The Wyoming Stock Growers Agricultural Land Trust ("WSGALT") is dedicated to Wyoming's ranching and farming heritage. Its goal is to provide agricultural landowners with land conservation options to enhance their business planning to remain productive and independent

today, and better prepared to pass on their traditions to future generations.

WSGA established the trust as a separate legal entity in December of 2000 in response to the growing need within the ranching community to provide voluntary, private sector mechanisms that assist landowners in retaining their land in agriculture and in passing it on to succeeding generations. WSGALT became a federally registered charitable organization in July 2001. It accomplishes its objectives by receiving conservation easements, increasing awareness of tools to maintain ranchlands, and assisting in research into new opportunities to conserve working agricultural landscapes.

SUMMARY OF ARGUMENT

This brief explains why well-settled property and mineral law, the terms of the Pittman Act interpreted in light of this Court's decisions, and sound public policy all weigh in favor of a negative answer by this Court to the first question presented, and an affirmative answer to the second question. The Ninth Circuit's contrary rulings in this case convert an explicit limitation on government mineral interests in lands granted to pioneers under the Pittman Act into an implicit and functionally limitless government power to repossess newly-valuable economic resources once they have been developed on those lands by private parties. The Ninth Circuit's faulty judgment poses a serious threat to vital sand and gravel resources and the property rights of Western landowners, and thus to the accessibility and affordability of public and private development in Nevada and throughout the West. As a result, this Court's interpretation of the words "valuable minerals" in the Pittman Act – words that have a discernible and sensible meaning when read in the context of the general property and mineral law, this Court's decisions,

and the public policies which animated the Pittman Act and still apply today – could have consequences that reach well beyond the proper resolution of this dispute, influencing the development of the West for many years to come.

Moreover, as the Ninth Circuit suggested below, it views its decision in this case as merely another step in establishing the maximal reach of federal control over Western lands on the basis of an over-large interpretation of this Court's decision in the *Western Nuclear* case, one that itself had a rationale that has not stood the test of time and should be overruled. Therefore, this Court's decision in this case has implications not just for the meaning of the Pittman Act and the rights of BedRoc and other property owners subject to that law, but also for the many millions of acres of land subject to more than a dozen similar statutes that govern land ownership throughout the West. Permitting the Ninth Circuit's reading of the Pittman Act, *Western Nuclear*, and the general property and mineral law – as well as that court's non-reading of this Court's other relevant decisions – to run free in this case will only inspire additional governmental efforts in the coming years to acquire through statutory retrospective reinterpretation that which patentees earned and received in years past. A decision to reverse the Ninth Circuit will not only do justice in this case, but will also encourage a return to the established principles of property and mineral law and reasonably certain allocations of property rights relied on by landowners and regulators for most of the 20th century before the Ninth Circuit delivered its unorthodox decision below.

ARGUMENT

I. Background Of Petitioners' Case

The Pittman Act was part of Congress's effort to encourage settlement of the American West through land

grants to those who were willing to lead the way, if only there was some hope of reward for the substantial financial and personal risks associated with prospecting in the Western deserts.[2] The Act authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands ... in the State of Nevada."[3] A prospector who discovered and successfully developed an underground water source could obtain a patent for up to 640 acres of land. Such a patent reserved to the United States "all the coal and other valuable minerals," and the reserved mineral estate would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."[4]

Sand and gravel were widespread on these Nevada desert lands in 1940, when the patent issued for the land in dispute here,[5] but there was no market for such materials at that time due to the remote location. *See* Excerpts of Record at 34-35. Location is critical when it comes to determining the value of sand and gravel deposits, for low marginal profits and high transport costs have always made it important that these supplies lie close to their market. Expansion of the city of Las Vegas in the 1990s created a market for gravel in the area. *Id.* at 34-35, 37. Affordable sand and gravel are essential ingredients in urban and suburban growth. Nevada is growing quickly, driven by Las Vegas development that makes it "one of the fastest growing

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[2] *See* 41 Stat. 293-95 (1919).

[3] *Id.*

[4] *Id.* § 8.

[5] *See BedRoc Ltd. v. United States*, 314 F.3d 1080, 1083 (9th Cir. 2002).

cities in America."[6] This growth makes the availability of affordable sand and gravel essential to the continued health of the state's economy.

In this case the Ninth Circuit allocated title to sand and gravel on Petitioners' land to the federal government, based on erroneous applications of the Pittman Act itself, of this Court's 1983 ruling in *Watt v. Western Nuclear*[7] that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"),[8] and of fundamental principles of property and mineral law

Thus, notwithstanding a statute and precedents indicating that the sand and gravel on the land at issue belonged to Petitioners, the Ninth Circuit has undermined the settled expectations of Petitioners, other Pittman Act patent holders, and holders of patents under numerous other land grant statutes. This Court should reverse the Ninth Circuit's erroneous, overbroad, and dangerous interpretation of statutory mineral reservations.

II. The Ninth Circuit Erroneously Ignored Settled Property And Mineral Law That Presumptively Places Rights To Sand And Gravel In Petitioner, Not The Government

It is a fundamental tenet of property law that conveyances are to be interpreted at the time of the grant in accordance with the intent of the parties.[9] Any other

[6] Patrick Barta, *Acres and Pains: Growing Scarcity Of Land Alters Home Economics*, WALL ST. J., Apr. 15, 2003 at A1.

[7] 462 U.S. 36 (1983).

[8] 43 U.S.C. §§ 291 *et seq.* (1976).

[9] *See* HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY §6.1 (5th ed. 2001).

interpretation would create shifting private property rights whose security would simply be at the whim of the current market for particular minerals.[10]

With respect to sand and gravel in particular, the widely-accepted background rule bestows mineral rights on the holder of the surface estate. Thus, "[t]he *vast majority of courts* have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals."[11] In addition, contrary to the Ninth Circuit,

[10] *See, e.g., Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] if it has the requisite value. And there may be instances wherein a reservation of minerals has been made in past years and wherein the requisite value was present and recognized to be so in the minds of the parties.") (concurring opinion).

[11] *Miller Land & Mineral*, 757 P.2d 1001, 1003 (Wyo. 1988). *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954); *Miller Land & Mineral*, 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (limestone not reserved where government acquired surface estate from private party). *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not

(continued....)

"[m]ost state courts that have addressed the issue have concluded ... that ordinary sand and gravel are part of the surface estate."[12] Thus, in the absence of some contrary expression of intent in the Pittman Act, it is only reasonable to assume that rights to sand and gravel passed to patent holders under that statute, along with other conventional interests.

These fundamental concepts apply with even greater force where Congress grants land and attempts to induce investment through the creation of private property rights. As the *Western Nuclear* dissenters explained, "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of

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(continued) . . .

mandated in the statute itself. *See United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands"); *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 681 (10th Cir. 1986) (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"); *Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties ... as used in the exchange patent at issue"). *See also* John S. Lowe, *What Substances Are Minerals?*, 30 ROCKY MTN. MIN. L. INST. 2-1 (1984); *Miller Land & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is [ ] confusion, we suspect that the [*Western Nuclear*] case is the culprit ... .").

[12] Jean Feriancek, *What Constitutes a Mineral?*, 15-SPG NAT. RESOURCES & ENV'T 261, 279 (2001).

that soil."[13] Here, under the Pittman Act, Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures."[14] To now deny rights to sand and gravel, simply as a result of changing local market conditions, would frustrate this intent of Congress to encourage development on Pittman Act lands.

III. The Ninth Circuit's Resort To *Western Nuclear* Should Fail Because It Neglects To Acknowledge The Limited Reach Of That Decision, Account For The Critical Textual Difference Between The SRHA And The Pittman Act, Or Reconcile Other Precedents Of This Court

The Ninth Circuit ignored the settled law and sound principles described in Part II in favor of its own idiosyncratic conversion of this Court's narrow decision in *Western Nuclear* into a broad repudiation of limitations on federal reservations of mineral rights. In *Western Nuclear*, this Court held that under the SRHA, a clause reserving to the United States "all the coal and other minerals" on lands patented under that Act included gravel.[15]

As an initial matter, it is not at all clear that *Western Nuclear* has survived the test of experience. The opinion is an anomaly in public land law and an odd disturbance in private property rights – contrary to longstanding mining and

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[13] 462 U.S. at 71-72 (Powell, Rehnquist, O'Connor, and Stevens, J.J.).

[14] H.R. Rep. No. 66-286, at 1 (1919).

[15] 462 U.S. at 37 (citing 43 U.S.C. § 299).

property law precedents.[16] This Court now has an opportunity to bring its precedents in line with longstanding mineral law and end the confusion by overruling *Western Nuclear* and permitting Western landowners to once again use and conserve their property according to settled expectations.

The most recent evidence of the weakness of *Watt v. Western Nuclear* comes from the United States Court of Appeals for the Tenth Circuit, which recently ruled that gravel is not a "mineral" included in the reservation of federal mineral rights in an exchange patent issued under the Indian Reorganization Act of 1934.[17] Refusing to apply *Watt v. Western Nuclear* in the exceedingly broad manner created by the Ninth Circuit in the case before this Court, the Tenth Circuit relied in part on an important 1956 opinion of the Interior Solicitor that the worth of materials must be evaluated in terms of the economic value of such resources at the time of conveyance and reservation.[18] In light of the

[16] *See, e.g., United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (distinguishing *Western Nuclear* and remanding to district court to determine whether gravel was a mineral included in the reservation of an exchange patent issued under the Indian Reorganization Act of 1934); *See also Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999). *See also, e.g.,* Feriancek, *supra* note 12 at 262 ("The *Western Nuclear* decision did not answer the question of gravel ownership on lands patented under statutes other than the SRHA, or as to minerals acquired by the federal government through other means such as land exchange.").

[17] *United States* ex rel. *Southern Ute Indian Tribe v. Hess*, No. 02-1212, ___ F.3d ___, 2003 WL 22664678 (10th Cir.(Colo.), Nov. 12, 2003).

[18] *Id.*, 2003 WL 22664678 at *11-12 (citing U.S. Dep't of the Interior, Solicitor Op. M-36379 at Summary (Oct. 3, 1956)). *See also Western Nuclear*, 462 U.S. at 67 n.11 (Powell, J., dissenting) (citing same opinion of the Interior Solicitor).

Tenth Circuit's sensible skepticism about the utility of *Western Nuclear* as a guide to Western land law, and, at the same time the Ninth Circuit's tendency to treat *Western Nuclear* as a license to grant property rights to the federal government willy-nilly, it is difficult to see what good it does for this Court to permit *Western Nuclear* to remain the law of any land.

Nonetheless, even if this Court chooses to leave in place its ruling in *Western Nuclear,* that case dealt with a broad reservation of "all … other minerals" under the SRHA, while this case involves a more limited reservation under the Pittman Act. And, finally, the Ninth Circuit failed to account for important and relevant decisions of this Court and of the Department of the Interior – decisions reflecting an understanding that land grants of the sort at issue in this case should not be manipulated by bureaucrats or judges to unfairly change the conditions of a deal on which citizens and their government came to terms long ago.

A. The Words "Valuable Minerals" In The Pittman Act Restrict The Government's Mineral Rights, Contrary To The Ninth Circuit's Construction Relieving The Word "Valuable" Of All Meaning

There is a big difference between the statute this Court interpreted in *Western Nuclear* (the SRHA) and the statute this Court is interpreting in this case (the Pittman Act). The SRHA broadly reserved to the federal government "all the coal and other minerals" on patented lands, while in contrast the Pittman Act reserved less – "all the coal and other *valuable* minerals." The Ninth Circuit acknowledged its need

to find a way around the Pittman Act's explicit limitation of the federal reservation to "valuable minerals," if that court was to equate the issues here with the issues in Western *Nuclear*, and thus reach the same result.[20]

The Ninth Circuit's decision hinges on that court's labored and implausible construction of the word "valuable" to mean simply nothing – thereby enabling the court to equate the case before it with *Western Nuclear*. This Court should reject that construction as an unjustified judicial amendment of the Pittman Act.

The court below took two paths. First, it announced that the word "valuable" had no meaning as a restriction of federal mineral rights: "Congress did not intend to convey any mineral rights to patentees under the Act."[21] Second, noting this Court's longstanding insistence that courts avoid needlessly excising words from statutes,[22] the Ninth Circuit also set out to prove that the word valuable could apply to sand and gravel in the Nevada desert before the casinos were built, a proof functionally indistinguishable from the court's initial assertion that the use of the qualifying "valuable" was no qualification at all.

To reach the conclusion that sand and gravel in the Nevada desert in the early years of this century were to the United States "valuable minerals," the Ninth Circuit constructed a definition of "valuable" in the mineral context that can be summarized as a five-step process:

[20] *BedRoc*, 314 F.3d at 1089.

[21] *Id.*

[22] *Id.* (citing *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)).

First, identify a piece of land that contains common mineral materials that the federal government seeks to own – here, Petitioners' land.

Second, identify the particular types of common mineral materials that the federal government seeks to own – here, Petitioners' sand and gravel.

Third, find a document that estimates the dollar value of annual production of those common mineral materials at the time the federal government enacted the relevant statute (here, the Pittman Act), but without regard to where or under what circumstances those production values arose, or whether they had any relationship to the piece of land containing the common mineral materials that the government seeks to own. Here, the Ninth Circuit relied on early 20th century reports on nationwide sand and gravel production. There is no indication that any of the sand or gravel was produced or consumed anywhere near Petitioners' land or even in the State of Nevada, nor is there any indication of whether there was any market in which sand or gravel from Petitioners' land would have had any value, given the high cost of transporting sand and gravel.[23]

Fourth, adopt a multiplier to enlarge the dollar value to purportedly modern proportions. Here, the Ninth Circuit adopted as authoritative a multiplier available at the "How Much Is That Worth Today" web site.[24] The court failed to note, however, the bold type at the top of that web site: "NOTE: Please also see *What is the Relative Value?*, which presents five different ways (including the CPI) that can be used to compare the worth of a United States Dollar for the

[23] *Id.* at 1088-89.

[24] *Id.* at 1089.

years 1789-2002."[25] Nor did the court below bother to report the cautionary note on the web site that,

> Determining the *relative* value of an amount of money in one year compared to another is more complicated than it seems at first. There is no single "correct" measure, and economic historians use one or more different series depending on the context of the question.
>
> Most indices are measured as the price of a "bundle" of goods and services that a representative group buys or earns. Over time the bundle changes; for example, carriages are replaced with automobiles, and new goods and services are created such as cellular phones and heart transplants.[26]

Thus, it appears that while the Ninth Circuit was unwilling to acknowledge that the value of particular items must be evaluated in context, the very experts on whom the Ninth Circuit relied for its dollar valuation recognize the importance of context, including the relevance of regional data.[27]

Fifth, announce that the resulting dollar amount is large enough to show that the common mineral materials contained in the piece land that the federal government seeks to control were valuable at the time the land passed into private hands.[28]

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[25] *See* http://eh.net/hmit/ppowerusd/.

[26] *See* http://eh.net/hmit/compare/.

[27] *See* http://www.eh.net/hmit/unskilledlabor/source.htm.

[28] *BedRoc*, 314 F.3d at 1089-90.

Thus, for example, if sand and gravel sales totaled roughly $35 million in the United States in 1919, then sand and gravel were "valuable minerals" in the Nevada desert, even if sand and gravel were all the eye could see for miles around, and the whole point of prospecting for water was to convert some small patches of the vast expanse of sand and gravel that was perceived to be useless at that time into something perceived to be useful. Likewise, by the Ninth Circuit's reasoning, if block ice sales totaled $10 million in the United States in 1919, then block ice was a "valuable mineral" near the residences of Americans everywhere, including those residing on ice shelves off the northern coast of the Alaska Territory.

The question, then, after the Ninth Circuit's decision below, is what does *not* count as a "valuable mineral" owned by the federal government? Ice in the Alaskan Arctic, sand in the Nevada desert of 1919 – under the Ninth Circuit's interpretation of the Pittman Act, everything is valuable everywhere as long as there is a market for it somewhere. This is doctrine in a state of dilatatio ad absurdum – an exercise that deprives of all meaning the restrictive term "valuable" in the Pittman Act's restriction of federal mineral rights to "valuable minerals" and instead expands it to embrace everything that is not animal or vegetable. It cannot serve as a rational mechanism for defining the boundaries between private and governmental property rights under the Pittman Act or any statute, unless the purpose of statutory interpretation in this context is always to transfer to the federal government that which it desires.

B. This Court's Decisions In *Amoco* And *Leo Sheep* Trump The Ninth Circuit's Strained Reading Of *Western Nuclear*

Since the 1983 decision in *Western Nuclear*, this Court has had at least one opportunity to again consider whether

the federal government should be able to revise its land grants based on later developments that make formerly useless minerals valuable in the present. It has rejected that supposition.

In 1999, in *Amoco Production Co. v. Southern Ute Indian Tribe*,[29] this Court held whether a deposit is valuable when a statutory mineral reservation becomes effective should not later change due to a fluctuating market. The common conception at the time of enactment determines the meaning of the law.

The *Amoco* Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. This Court held that "the *common conception* of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource."[30] According to the Court:

> The question is not whether, *given what scientists know today*, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."[31]

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[29] 526 U.S. 865 (1999).

[30] *Id.* at 874 (emphasis added).

[31] *Id.* at 873 (emphasis added).

At the time the Pittman Act was passed and the patent at issue was granted, sand and gravel in rural Nevada were not considered valuable minerals. The scope of property rights granted should not be allowed to change today simply because of alterations in markets and technology. As this Court explained in *Leo Sheep Co. v. United States*:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations ... .[32]

The Department of the Interior itself has acknowledged that value should be determined at the time a patent is obtained, *not* at some later date. This interpretation should stand. When interpreting an analogous 1926 statutory mineral reservation, the Department concluded that only deposits valuable at the time of conveyance were reserved;

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.[33]

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[32] 440 U.S. 668, 687 (1979) (citations omitted).

[33] U.S. Dep't of the Interior, Solicitor Op. M-36379 at Summary (Oct. 3, 1956) (emphasis added) (cited in *Western Nuclear*, 462 U.S. at 67 n.11 (Powell, J., dissenting)).

The Solicitor explained that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas."[34] The Department of the Interior thus recognized that sand and gravel were not intrinsically valuable minerals and would only be reserved when they had economic value at the time of conveyance.

If taken to its logical conclusion, the Ninth Circuit's decision would, in fact, make almost all surface rights granted under the Pittman Act subject to federal property, permission, and control. The Ninth Circuit's rationale could leave Pittman Act and other Western surface landowners "with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result."[35] Indeed, if the government could find data showing that there was market somewhere in the United States for dirt, and the web site multiplier were high enough, even dirt would not be safe. Dirt would also be at risk if the land were used for agriculture, since crops on Pittman Act lands can only grow by draining minerals from the soil. These minerals are thus "valuable" because they contribute to the health of the crops. If the Ninth Circuit's broad rationale is sustained, then these crops could also be federal property – having extracted valuable minerals from the soil. Surely, this was not the intent of Congress. Surely, this Court should reverse a ruling that would lead to such a result.

[34] *Id.* at 4 (emphasis added).

[35] *Western Nuclear*, 462 U.S. at 61 (Powell, J., dissenting).

The Ninth Circuit's decision adversely affects private property rights. The Ninth Circuit's erroneous interpretation of *Western Nuclear* and neglect of other relevant authorities may well govern property rights not just on those Pittman Act lands directly at issue, but on all lands patented under similar general statutory mineral reservations under at least thirteen federal statutes requiring the reservation of all minerals in certain conveyances by the United States.[36] This Court should resolve the Pittman Act issues involved here in a manner that not only gives meaning to the term "valuable minerals" and comports with property and mineral law of long standing, but also cuts off the potentially devastating precedential effect of this case at the pass before the Ninth Circuit's broad ruling is used to alter the rights of landowners throughout the West.

IV. The Ninth Circuit's Ruling Harms The Vital Trade In and Control Over Sand And Gravel

When the federal government claims ownership of sand and gravel, landowners lose dominion and control over those resources and their property as a whole. It matters who owns the sand and gravel resources on these western lands for a wide range of users and a wide range of interests.

A variety of land and resource uses are precluded. Landowners cannot extract those resources for necessary uses on their own property – for structural buildings, pits, reservoirs, roadways, and other uses critical to the operation of their lands – when they are deemed federally owned. Landowners cannot sell the extraction rights or extract the sand and gravel themselves for the commercial market. Federal ownership also minimizes their ability to control the

[36] *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002).

means and methods of extraction. Landowners are removed from the decision making process related to *if, where, when, and how* extraction will take place, risking damage to the surface and a reduction in resale values. The impact from this loss of control can be devastating to homesteaders, farmers, ranchers, and other property owners. Many of WSGA's members already know the pain that can be inflicted by broad interpretations of statutory mineral reservations from the direct impact of this Court's decision in *Watt v. Western Nuclear*.

There is another critical loss to landowners when dominion over sand and gravel is deemed federal – the ability to choose to leave the resources in place and the land undisturbed. Increasingly, landowners in the West have an interest in creating conservation easements. WSGALT was created to assist this process in Wyoming, and similar organizations exist throughout the country. Conservation easements are a valuable method to protect the environment and a means by which landowners can diversify their surface use. If a landowner controls the rights to the resource, he can forgo extraction in favor of the conservation easement. If he does not own such rights, the incentives to create the easement disappear and an environmentally positive outcome is precluded.

Landowners suffer when the government claims ownership of common sand and gravel, but so do the extraction industry and downstream market consumers. If left standing, the Ninth Circuit's decision will impair the sand and gravel industry in the western United States and its ability to contribute to the nation's economy. This industry serves an important role in all forms of economic activity, including the activities of and transactions with the members of *amici*.

Sand and gravel are among the most common of earth's geological materials. Sand and gravel are common materials for fills and as a base for pavements, including interstate highways, and local mine roads, private ranch, farm and other roads, as well as other structures. When combined with cement binders, sand and gravel become the principal ingredient in an unusually strong and long-lasting construction material – concrete – whether used in its plastic state and placed in forms, or precast as pipe, block and other structural components. When combined with asphalt, sand and gravel become the aggregate forming the major element of a widely used paving material, asphaltic concrete.

Sand and gravel are the most common materials used as aggregate. In fact, in some sections of the country these materials are the only available source of aggregate that can be provided economically. As natural deposit materials, sand and gravel are highly useful resources but *only* when they are relatively close to those locations where aggregates may be needed. Wherever communities, homes, and industrial operations have been established, sand and gravel are necessary as aggregates. The national annual consumption of aggregates including sand and gravel is more than ten tons (21,000 pounds) per capita. Of course, the producers of sand and gravel must abide by governmental regulations, including environmental controls.

One unique aspect of sand and gravel operations lies in the economics of its extraction. Due to transportation costs, it is critical for the extraction industry and consumers to utilize sand and gravel deposits near the market for these materials. Sand and gravel are bulky, heavy and relatively lost cost products. As such, these products can absorb little increase in hauling distance from extraction site to consumer without a prohibitive increase in delivered product cost. As a result, the majority of such extraction sites are close to the point of

product use (usually within a metropolitan area where the demand for land and other uses is pressing and acute, like the ever-expanding areas in Nevada).

The inability of industry, landowners, and others to use sand and gravel locations which are subject to other uses – or taken outside of private ownership – can only lead to increasing extraction and construction costs. As one example, "The fundamental problem of the [sand and gravel] industry, therefore, is that of securing the right to continue to produce sand and gravel for the construction industry at locations that are economically feasible."[37]

Compliance with current land use and other environmental controls – many supported by the aggregate mining, and construction industries – makes aggregate extraction an activity accepted by communities as a responsible contributor to the economy. Nevertheless, there are still difficulties in securing the right to produce sand and gravel because of local zoning ordinances, state acts, and federal controls affecting the industry's surface mining activities. The substantial capital investment required for modern sand and gravel plants is already a risky undertaking for the prospective producer without increased costs associated with federal property controls such as those created by the Ninth Circuit's ruling at issue here.

This investment will become all the more difficult (and, indeed, prohibitive in many cases) if the federal government can now claim ownership to millions of acres of deposits in the western United States. Substantial past investments, reasonably made on the expectation of private ownership,

[37] Nat'l Stone Sand and Gravel Association, *The Sand and Gravel Industry: A Valuable Resource – A Vital Construction Material*, available at www.nssga.org/whoweare/sandgravel.htm.

will be threatened; and many future investments and production activities may be thwarted.

Traditionally a matter of state and local control, aggregate operations that *can* obtain federal authorization to extract the sand and gravel deposits that the Ninth Circuit considered "reserved" to the United States will be subject to a whole host of new federal rules and regulations. Many of these will be duplicative of responsible controls already in place at the state and local level, and all of them will unnecessarily increase the costs of an activity with an already low marginal profit.

The imposition of federal ownership will require any private party seeking to gain access to federal "reserves" to deal now with the costly requirements of, and the delays associated with, the National Environmental Policy Act,[38] the Endangered Species Act,[39] the National Historic Preservation Act,[40] and many other federal controls – not to mention simply the cost of negotiating an extraction authorization from the federal government and fair market value payments. This will require environmental assessments, species consultation, and cultural resource assessments, among others.

Moreover, surface owners who have federally owned sand and gravel reserves on their lands will have their dominion disrupted because they will be required to permit outsiders with federal sand and gravel licenses on to their land for extraction. As a result, where federal minerals exist on private lands, extraction companies must conduct many

[38] 42 U.S.C. §§ 4321 *et seq.*

[39] 16 U.S.C. §§ 1531 *et seq.*

[40] 16 U.S.C. §§ 470 *et seq.*

types of environmental assessments on the private lands, particularly cultural resource surveys. Many of WSGA's members have faced this situation – one that brings significant inconvenience and costs to surface owners.

The federal government would become the principal party in common aggregate operations and discourage the extraction and use of these resources. This outcome does not reflect the intent of the Pittman Act nor our general public land policies which traditionally supported private ownership and dominion over lands conveyed.

In the case of Nevada, more than 83 percent of the state's land is already owned outright by the federal government.[41] Now, as a result of the Ninth Circuit's misguided application of this Court's own dubious opinion in *Western Nuclear*, long-settled expectations of many owners of those Western lands that are in private hands are at risk. Absent this Court's intervention to correct the Ninth Circuit's dangerous detour away from settled principles and sound policies of property, mineral, and federal land law, there may be little left in the law to govern the reach of the federal government when it seeks to expand its share in the ownership of estates split between private surface rights and federally-reserved mineral rights.

The Ninth Circuit has all but announced, and not for the first time, an irrebuttable presumption in favor of the federal government under the Pittman Act and other land grant laws, explaining that the court is merely enforcing what it views as the "full reservation of mineral rights [that] was the policy in

[41] *See* U.S. Dep't of the Interior, PUBLIC LAND STATISTICS at Table 1-3 (2001).

place at the time of the Act's passage."[42] Alas, the Ninth Circuit's entrenched view makes little sense in light of Congress's selection of different terms to govern land grants under different laws, as the lower court's judicial excision of the word "valuable" from the Pittman Act makes clear.

Finally, while the Ninth Circuit's view of the Pittman Act in particular and the land grant laws in general makes little of the essential underlying commitments between the United States and the pioneers of an earlier generation to make the West a productive, livable part of this country in return for the opportunity to share in the prosperity of the settled lands,[43] this Court has recognized that such a socially beneficial deal is not to be discarded lightly. As this Court has held, when Congress:

> offers to individuals or to corporations as an inducement to undertake and accomplish ... works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[44]

The Ninth Circuit's ruling, if allowed to stand, would make citizen landowners subservient to the federal government rather than serve the purposes of the Pittman Act to encourage development in the West.

[42] *BedRoc*, 314 F.3d at 1086-87 (citing *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir. 1977)).

[43] *Id.* at 1085.

[44] *Leo Sheep*, 440 U.S. at 683 (citation omitted).

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

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In The Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials), worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule regarding the reservation (or non-reservation) of sand and gravel on land patented by the federal government in the early twentieth century, whether congressional intent would be better served by a rule that common materials such as sand and gravel are *not* reserved to the government as "valuable minerals."

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STATEMENT OF THE CASE[1]

The NSSGA is a nationwide trade organization whose membership represents ninety percent of the annual production of crushed stone and seventy-five percent of the annual sand and gravel production in the United States. During 2002, a total of about 2.73 billion metric tons of crushed stone, sand and gravel, valued at $14.6 billion, were produced in the United States. NSSGA's membership of approximately 800 companies includes major international corporations, regional operators, and small family-owned corporations extracting and selling product from a single location.[2] These entities have organized their business relationships on the basis of certain expectations, resting on a settled body of law governing ownership of sand and gravel in lands where the surface and mineral estates are severed.

Many NSSGA members operate on lands the title to which is descended from the various public lands acts of the late nineteenth and early twentieth century, including the Pittman Act at issue in the present case. The common

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[1] The parties have consented in writing to the filing of this brief. Copies of the parties' consents are being filed simultaneously with this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Assertions concerning the scope and economic importance of the sand and gravel industry are derived from STEPHEN S. FULLER, THE IMPACTS OF THE CRUSHED STONE, SAND & GRAVEL INDUSTRY ON THE U.S. ECONOMY (National Stone, Sand & Gravel Association 2003). The pamphlet is available at www.NSSGA.org.

interest of all NSSGA members in this case lies in affirming a consistent rule of interpretation for mineral reservations, and opposing a ruling that would cause the retroactive transfer of ownership of sand and gravel from the owner of one estate to the owner of another by judicial reinterpretation of long-standing property relationships. Members have ordered their affairs, paid royalties, and made substantial capital investments in reliance on what they understood to be settled and predictable principles of property law. The Ninth Circuit's decision would upset those expectations, which would have profound consequences, the measure of which the Ninth Circuit could not possibly predict, for the surface owners potentially affected by this decision. The inability even to forecast such consequences provides a compelling reason to affirm a consistent, plain-language interpretation of mineral reservations in order to safeguard well-founded expectations and ensure the certainty of title held by NSSGA members, and other owners of split estates, across the western United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, 1a-21a) is reported at 314 F.3d 1080. The opinion of the District Court for the District of Nevada (Pet. App. B, 22a-38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (Pet. App. C, 39a-63a) is reported at 140 IBLA 295 (1997).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor granted an extension of time to file a petition to April 30, 2003. The petition was filed timely and this Court granted a writ of certiorari on September 30, 2003. The Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pittman Underground Water Act, 78 Stat. 293-95 (repealed 78 Stat. 389 (1964)) is set forth at Pet. App. D (64a-68a). Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 90 Stat. 2744 (1976)), and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611, are set forth at Pet. App. E and F (69a-71a).

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to revisit and strengthen a number of essential constructs with regard to the law of federal land patents and property law in general. Among these basic principles are the critical need to apply the plain language to effectuate the purposes of unambiguous legislation, the vital importance of construing the language of a property grant at the time of granting, and the fundamental significance of certainty of title. This Court should require the Department of the Interior ("Interior") to honor the promises it made decades ago, as those promises were intended at the time.

The Ninth Circuit's ruling misapplied fundamental principles of statutory construction. Statutory terms must be interpreted and applied according to their common meaning at the time the legislation was enacted. Congress is presumed to have known of that meaning and of the holdings of contemporaneous administrative decisions interpreting and applying the terms at issue.

In addition, the Ninth Circuit misapplied the maxim of interpretation that limits the scope of grants from the United States under the public lands laws by applying it to the reservation rather than to the grant.

ARGUMENT

In the early years of the Nation's westward expansion, the country's land disposal laws encouraged settlement and development by making it possible for individuals to acquire a tract by farming, building, and settling on it for a statutory period. Before 1909, the various land disposal laws passed by Congress distinguished between lands that were classified as "mineral in character" (that is, chiefly valuable for the production of minerals) and those that were non-mineral (deemed chiefly valuable for agriculture). Patents issued under the non-mineral classification statutes did not reserve minerals to the United States, but conveyed the full fee interest in the lands. *See, e.g.*, Richard Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 ROCKY MTN. MIN. L. INST. 326, 386-406 (1972).

In the first decade of the twentieth century, public concern grew over the apparently dwindling supply of coal available for production from the public lands. In particular,

there was public outrage over the large amounts of the public domain, particularly coal and oil-producing lands, that had apparently been fraudulently patented under the agricultural entry statutes. In response to these concerns, President Theodore Roosevelt withdrew millions of acres of land from entry under the homestead laws, and forced Congress to reform the system of land disposal acts. Congress responded by enacting laws requiring the reservation of specified minerals in patents issued by the United States. The earliest of these Acts, the Coal Act of 1909, 35 Stat. 844 (repealed 1976), and the Coal Act of 1910, 36 Stat. 584 (repealed 1976), reserved only the coal estate in favor of the United States. Those acts were soon followed by others which reserved additional minerals, including the Pickett Act, 36 Stat. 847 (repealed 1976), the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 1976), and the Pittman Act. *See generally Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999).

Between 1805 and 1945, some 987 million acres of the public domain passed into private ownership. Of these, approximately 70.4 million acres were patented under the Stock-Raising Homestead Act, 16.2 million acres were patented under the Coal Acts of 1909 and 1910, and an additional 51 million acres were patented under the other land disposal acts, including the Pittman Act, that required or permitted the reservation of certain minerals to the United States.[3] Among the lands included in this last group were those at issue in this case.

[3] LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN-DISPOSAL AND RESERVATION POLICIES 1900-1950 347 (Arno Press, New York

(Continued on following page)

In 1976, Congress repealed most of the land disposal laws, and replaced the policy of disposal with one favoring retention and management of the public lands.[4] In implementing that policy since 1976, Interior has sought to establish a rule that sand and gravel, which were not considered to be minerals at the time the public land disposal laws were passed, were included in the reservation of minerals in patents issued under those Acts. The current case is part of that trend. *See, e.g., Andrus v. Western Nuclear*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd sub nom. Watt v. Western Nuclear*, 462 U.S. 36 (1983) (construing Stock-Raising Homestead Act of 1916); *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676 (10th Cir. 1986) (construing the Taylor Grazing Act); *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (construing the Indian Reorganization Act, 25 U.S.C. § 465).[5] In each case, Interior's policy goals have threatened the security of title of patentees and their successors by retroactively claiming reserved ownership of a significant component of the surface estate which had been presumed for decades to be a part of the original grant.

1972); Loren Mall, *Federal Mineral Reservations*, 20 ROCKY MTN. MIN. L. INST. 399 (1975).

[4] The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785. *See* Eleanor Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979).

[5] The Tenth Circuit remanded *Hess*. The District Court's decision on remand was reversed November 12, 2003. *United States v. Hess*, No. 02-1212 (10th Cir. filed Sept. 20, 2002).

In the present case, the lands at issue were designated by Interior as "non-mineral in character" in 1934 and made eligible for patent under the Pittman Act. BedRoc Limited's predecessor obtained a patent to these lands in 1940, a time in which no commercial market existed for this deposit of sand and gravel (although it was both evident and abundant in supply at the time of granting), because the lands were situated in the relative isolation of the Nevada desert. This state of affairs continued uninterrupted for more than five decades due to the remoteness of this tract of land from any infrastructure which would lend commercial viability to these otherwise valueless common materials. It was not until the early 1990s, when sand and gravel extraction operations first became profitable on these lands due to the expansion of Las Vegas, that Interior asserted – for the first time – its alleged right to the sand and gravel located on the property pursuant to the patent reservation of coal and other valuable minerals.

I. Sand and Gravel Were Not "Valuable Minerals" Intended to be Reserved to the United States Under the Pittman Act

A. *Western Nuclear* Does Not Govern the Decision in This Case

This case presents an important opportunity for the Court to revisit *Western Nuclear* and affirm the fundamental importance of certainty of title by ruling that sand and gravel were not "valuable minerals" *per se* in 1919. As argued in the Brief for Petitioners, the District Court and the Ninth Circuit improperly relied on *Western Nuclear* as a basis for its decisions in this case. *See BedRoc Limited,*

L.L.C. v. United States, 314 F.3d 1080, 1086-90 (9th Cir. 2002). *Western Nuclear* does not govern the determination of this matter for a number of reasons, including the fact that *Western Nuclear* concerned broader reservation language under the Stock-Raising Homestead Act of 1916. The central questions in this case – namely, the value of the specific gravel at issue and when that value should be determined – were neither raised nor decided in *Western Nuclear*.

B. The Intention of Congress in 1919 Determines the Scope of the Reservation of Valuable Minerals Under the Pittman Act

Unlike Section 9 of the Stock-Raising Homestead Act of 1916 – addressed in *Western Nuclear* – in which Congress reserved "all the coal and other minerals" to the United States, Section 8 of the Pittman Act contained a more limited reservation of "coal and other *valuable minerals*," requiring:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Pittman Act, § 8. Interior's claim in this case is for ownership of certain sand and gravel deposits that became valuable in the 1990s, more than fifty years after the

grant. The plain meaning of the word "valuable minerals," as used in the Pittman Act in 1919, did not include the sand and gravel at issue in this case because these minerals were not included within the contemporaneous definition of the term "mineral" when the Pittman Act was passed, and did not have intrinsic value either then or at the time of the grant.

In 1919, Interior used a two part test for determining whether something was a "valuable mineral deposit." First, the substance must have been "recognized as a mineral by the standard authorities," and second, it must have been present "in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes." *Pacific Coast Marble v. Northern Pacific R. Co.*, 25 L.D. 233, 244-45 (1897). Sand and gravel were not valuable minerals *per se* in 1919, nor is there evidence that this deposit would have been deemed valuable under the test.

1. The Scope of the Estate Conveyed and Reserved Under the Pittman Act Must Be Determined at the Time of the Grant

It is axiomatic that the scope of a conveyance of real property must be determined at the time of the grant. *See, e.g., Amoco Prod. Co.*, 526 U.S. at 873 ("The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910."); *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well

as the meaning of the particular provisions in it."). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . *at the time Congress enacted the statute* . . . ." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (emphasis added).

In this case Interior's contemporaneous interpretation of the term "minerals" answers the question of whether sand and gravel were included within the definition of the term "valuable minerals," as used by Congress in 1919. *See generally Zimmerman v. Brunson*, 39 L.D. 310 (1910); *Litch v. Scott*, 40 L.D. 467 (1912); *Hughes v. Florida*, 42 L.D. 401 (1913). As discussed below, Congress is presumed to have been aware of the contemporaneous decisions and interpretations of agencies charged with the enforcement of a relevant statute, and those decisions serve as an important interpretive tool for determining congressional intent.

2. Congress Is Presumed to Have Been Aware of Existing Law, Common Law, and Contemporary Administrative Decisions Excluding Sand and Gravel From the Definition of the Term "Valuable Minerals"

When interpreting statutes in their historical context this Court has consistently imputed to Congress the knowledge of contemporaneous legal decisions, administrative interpretations, and common usages of settled terms at the time of passage to assist in the determination of congressional intent. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Traynor v. Turnage*, 485 U.S. 535, 546

(1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)); *see also South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938) ("Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility.").

"Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).[6] With regard to statutory mineral reservations, this Court has previously "emphasized that Congress 'was dealing with a practical subject in a practical way' and that it intended the terms of the reservation to be understood in 'their ordinary and popular sense.'" *Amoco Prod. Co.*, 526 U.S. at 823 (quoting *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914)).

Contemporaneous decisions and interpretations by the department charged with the enforcement of the statutes at issue have frequently been cited as a presumptive source of knowledge for purposes of determining congressional intent. For example, *Traynor* stated "we must assume that Congress was aware of the Veterans'

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[6] *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[W]e are unwilling to assume that Congress was ignorant of the substantial number of States providing additional workers' compensation awards" in 1936 when the statute at issue was passed); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) ("[I]n taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation. . . . Congress could not have been unacquainted with these facts. . . .").

Administration's interpretation of 'willful misconduct' at the time that it enacted §1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes." *Traynor v. Turnage*, 485 U.S. at 546. In *Morrison-Knudsen Const. Co. v. U.S. Dep't of Labor*, 461 U.S. 624, 632-33 (1983), this Court stated that its determination of congressional intent was aided by "the consistent policies of the agency charged with its enforcement." Similarly, in *Bob Jones University v. U.S.*, 461 U.S. 574, 590 (1983), this Court specifically relied upon the presumption of congressional knowledge of agency decisions, saying Congress had been made "acutely aware" of relevant Internal Revenue Service rulings for a dozen years before the legislation at issue was passed. Finally, in *United States Dep't of Labor v. Perini North River Assoc.*, 459 U.S. 297, 320 n. 28 (1983), this Court again affirmed the importance of contemporaneous agency interpretations, saying "[i]n order to withdraw coverage from employees, such as Churchill, who are maritime employees injured in the course of their employment upon the actual navigable waters, Congress would have had to ignore the consistent interpretation given the Act before 1972, by the Director [of the Department of Labor], the Deputy Commissioners, the courts, and the commentators."

In accordance with these important principles of statutory interpretation – that the scope of a statutory grant must be determined at the time of enactment of the statute, and that Congress is presumed to have knowledge of contemporaneous administrative interpretations for purposes of determining congressional intent – Interior decisions such as *Zimmerman* and its progeny are highly

relevant to the determination of whether Congress intended to include sand and gravel within the reservation of "valuable minerals" in 1919 when enacting the Pittman Act. These principles dictate that the term "valuable minerals" as used by the Congress in the Pittman Act does not include sand and gravel. In addition, to the extent that the majority decision in *Western Nuclear* was based upon the assumption that "it is most unlikely that many members of Congress were aware of the ruling in *Zimmerman*," 462 U.S. at 46, this Court's decision in *Western Nuclear* should be revisited.

3. Contemporaneous Authorities, Including *Zimmerman* and its Progeny, Dictate That Sand and Gravel Were Excluded From the Definition of "Valuable Minerals" at the Time of the Pittman Act in 1919

Contemporaneous legal decisions, administrative interpretations by Interior, and the common usage of the term in 1919 all support the conclusion that sand and gravel were excluded from the definition of "valuable minerals" when the Pittman Act was passed. To determine whether materials were "valuable mineral deposits" under the Mining Act of 1872, 30 U.S.C. sections 21 and 22, Interior relied on the tests set forth in *Castle v. Womble*, 19 L.D. 455, 457 (1894):

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable

> mine, the requirements of the statute have been met;

and in *Pacific Coast Marble*:

> The Department, . . . adheres to the rule: That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

Pacific Coast Marble v. Northern Pacific R. Co., 25 L.D. 233, 244-45 (1897).

With these tests in mind, Interior decided *Zimmerman v. Brunson* in 1910. In that case, Zimmerman contested the validity of Brunson's entry under the Homestead Act, arguing that the land was valuable for its gravel deposits. Interior considered the question of whether the presence of sand and gravel deposits could render lands "mineral in character," that is, more valuable for production of minerals than for agriculture, and thus closed to homestead entry. Relying upon the tests set forth above, Interior made the following determination:

> A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding

> that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

Zimmerman v. Brunson, 39 L.D. 310, 312 (1910). After reviewing a series of other Interior Decisions, the Secretary concluded:

> From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

Id. at 313. This decision was followed by *Litch v. Scott*, 40 L.D. 467, 469 (1912), where Interior found that land that was "almost entirely sand and gravel, and [from which] said Scott is selling gravel continuously," was not mineral in character.

Thus, almost a decade before the Pittman Act was passed in 1919, Interior's stated policy was that sand and gravel was not regarded as a mineral unless the particular deposit possessed a "peculiar property or characteristic" which gave it special value. *Zimmerman*, 39 L.D. at 312. Moreover, six years prior to the passage of the Pittman Act, Interior clarified that sand and gravel were not considered mineral in character even where a market was available and it had actually been removed for sale. *Litch*, 40 L.D. at 469. Given Interior's *per se* rule classifying lands from which sand and gravel were actually being sold in 1912 as non-mineral, it is difficult to imagine anything but the same conclusion regarding the deposit of sand and

gravel at issue in this case, for which no commercial market existed when the Pittman Act was passed in 1919, nor for more than seventy years thereafter.

II. Congress Did Not Intend that Sand and Gravel Be Developed Concurrently with the Surface of Pittman Act Lands or of Stock-Raising Homestead Act Lands

Sand and gravel were not locatable in 1919 under the Mining Act of 1872. As a result the Ninth Circuit's imputed purpose of the mineral reservation in the Pittman Act, concurrent development of surface and subsurface resources, could not have been accomplished by including sand and gravel in the reservation of "valuable minerals." This rationale was also relied on to justify the holding of *Western Nuclear*. This Court stated there that "[s]imply as a matter of consistent interpretation of statutes concerning the same subject matter, if gravel deposits constituted 'mineral deposits' that could be located under the mining laws, then presumptively gravel should constitute a 'mineral' reserved to the United States under the SRHA." *Western Nuclear,* 462 U.S. at 59. The discussion in Section I, above, makes it clear that sand and gravel deposits were not "mineral deposits" at the time of enactment of the Pittman Act or of the Stock-Raising Homestead Act. Interior's policy was to treat these deposits as non-mineral; *Zimmerman* and *Litch* indicate that common gravel deposits would not have supported a mineral entry under the Mining Act of 1872.

A. Sand and Gravel Could Not Have Been Developed Concurrently with the Surface as a Valuable Mineral in 1919

The *Western Nuclear* majority reasoned that:

> [s]ince Congress intended to facilitate development of both surface and subsurface resources, the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. . . . The reservation of minerals to the United States should . . . be construed by considering the purposes both of the grant and of the reservation in terms of the use intended.

Western Nuclear, 462 U.S. at 52 (citation and internal quote omitted). However, the majority failed to take note of the fact that the Court's stated purpose for reserving minerals, to promote their development apart from grazing uses of the surface, was not achievable with respect to sand and gravel when the Stock-Raising Homestead Act (and the Pittman Act) were passed. Sand and gravel were not locatable under the Mining Act at that time, nor was there a legal mechanism at that time by which a person could obtain the right to develop sand and gravel on Stock-Raising Homestead Act or Pittman Act patented lands.

In *Poverty Flats*, the Tenth Circuit pointed out that BLM could not treat caliche as a "mineral" for purposes of the reservation from the grant, and simultaneously dispose of it as a "material" under the Surface Resources Act of 1955, 30 U.S.C. section 611. *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676, 679-80 (10th Cir. 1986). Congress knew in 1916 that sand and gravel were not "minerals," and this Court in *Western Nuclear* incorrectly

concluded in 1983 that there was a legislative intent in 1916 to promote the development of sand and gravel under the Mining Act simultaneously with settlement of the surface. The record of numerous contemporaneous decisions shows that there was no provision in the Mining Act for doing so. The same reasoning applies with respect to the Pittman Act. There was no intent in 1916 (or in 1919) to promote the development of the surface simultaneously with the development of sand and gravel as "valuable minerals." Sand and gravel were not minerals for purposes of entry under the Mining Act, and there was no legal means by which to exploit them as materials.

B. There Was No Congressional Intent to Develop Sand and Gravel as Minerals on Pittman Act Lands

Moreover, in contrast to the Stock-Raising Homestead Act, the Pittman Act required that the Secretary of the Interior determine lands to be "nonmineral" before they were open for entry. Section 1 of the Pittman Act, 78 Stat. 293 (repealed 1964), provided that the Secretary was to grant a permit on "unreserved, unappropriated, nonmineral, nontimbered lands." Section 2 of the Stock-Raising Homestead Act authorized the Secretary to:

> designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation . . . and are of such character that six hundred and forty acres are reasonably required for the support of a family. . . .

39 Stat. 862 (repealed 1976). Thus, while the Stock-Raising Homestead Act did not require the lands be classified as mineral or non-mineral, the Pittman Act did require exclusion of mineral lands. Congress clearly intended that lands available for entry under the Mining Act of 1872 were to be excluded from entry under the Pittman Act, and were not anticipated to be developed simultaneously as grazing and mineral lands.

III. The Maxim of Interpretation that "Nothing Passes Except What is Specifically Named" was Applied Incorrectly in this Case Below and in *Western Nuclear*

In holding that sand and gravel were reserved as minerals from Pittman Act patents, the Interior Board of Land Appeals ("IBLA") in this case relied on an old maxim of interpretation: "the established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Earl Williams*, 140 IBLA 295, 314 (1997) (citing *Western Nuclear*, 462 U.S. at 59 (quoting *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957)); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978); *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919); *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 534 (1903)). This maxim is frequently invoked by Interior in cases involving the scope of grants from the United States, such as *Hess* and *Poverty Flats*.

This approach is not well suited for interpreting mineral reservations, however, and its invocation should not dictate the outcome in this case. First, as demonstrated above, the commonly accepted definition of "minerals," and

prevailing Interior policy at the time, indicate that Congress did not consider sand and gravel to be "valuable minerals" subject to reservation when the Pittman Act was passed. "The relevant intent of Congress is that existing at the time the statute was enacted." *Western Nuclear*, 462 U.S. at 62 (citing *Charlestone Stone Products Inc.*, 436 U.S. at 611). The maxim that ambiguity should be resolved in favor of the government does not carry the day in this case; there is no ambiguity of congressional intent on which to invoke it. Second, the application in this case of the principle that "nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government," would lead to manifest injustice, as it did in *Western Nuclear* and as it threatened to do in *Poverty Flats* and *Hess*. The doctrine is well suited for interpreting *grants*, but when it is applied to *mineral reservations* the exception swallows the grant.

Grants of land are made in general terms, while reservations are specifically made. The issue in this case, as it was in *Western Nuclear*, *Hess*, and *Poverty Flats*, is whether "valuable minerals" means "everything that could ever become valuable whether now or in the future." It is different than the issues presented in *Caldwell*, *Northern Pacific R. Co.*, and *Union Pacific R. Co.*, where the maxim received its early formulation and application to the interpretation of federal grants.

In *Caldwell v. United States*, the issue was the scope of a license to a railroad company of the right to use "timber necessary for the construction of said railroad" felled from the right of way on which the road was constructed. *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919). The company argued that "timber" included slash and other lumber, that is, everything that resulted from

taking the trees; the Court held that the term "timber necessary for the construction of said railroad" was not a grant of trees, but of timber actually used for railroad construction, by the maxim that "grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government." *Id.* Although the railroad was not allowed to sell the slash and other lumber, there was no question that it was allowed to use timber for construction.

In *Northern Pacific R. Co. v. Soderberg*, the Court considered whether certain lands were included in a statutory land grant to the railroad, which by its terms did not include minerals lands. *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 534 (1903). If the lands were mineral they could not be part of the land grant. The question was whether the term "valuable minerals" was limited to metallic ores, or included a deposit of granite suitable for use as a building stone. There was no split estate issue presented; the issue for the Court was whether the railroad received title to the land or the United States kept it open to entry under the Mining Act of 1872. The Court found the term "valuable mineral deposit" to be not limited to metallic minerals, found granite to be included in the term, and the lands at issue were mineral lands and therefore not included in the railroad land grant. *Id.*

In *United States v. Union Pacific R. Co.*, the United States sought to enjoin the railroad from drilling for oil and gas in the right of way that had been granted to it by Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). The Act granted a right of way for the actual route.

It also gave the railroad every alternate section on each side of the road, but reserved mineral lands from the grant. It did not explicitly except minerals from the right of way. The Court held that the grant of a right of way was limited to the use of the surface for railroad purposes, and that the congressional intent to reserve minerals (in that case, oil and gas) under the right of way was demonstrated by the fact that Congress excepted all mineral lands from the grant of alternate sections. *Id.* There was no issue of whether or not oil and gas were "minerals" for purposes of the reservation.

None of these cases addressed the issue presented by *Hess*, *Poverty Flats*, *Western Nuclear*, and this case. Where the substance in question makes up the whole of the surface, as sand and gravel do in this case, the application of the maxim that "grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government," if literally applied, would negate the entire grant. Reserving sand and gravel as a mineral would leave the putative owner with nothing except a bare license to use the surface, until the United States permits someone to come in, develop sand and gravel under the Materials Act, and destroy it. By invoking this maxim to try to bring sand and gravel within the scope of the reservation, the Government attempts to use an inapposite guide to interpretation and an alleged ambiguity to expand the reservation of "minerals," so much so that the holders of bona fide patents risk having their entire property destroyed. This cannot have been the intent of Congress. The better rule was articulated in *Poverty Flats*:

> New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions. The result otherwise would be a progressive series of changes dependent on the changes in the views of the officials or changes in personnel.

Poverty Flats, 788 F.2d at 683. As the court recognized, property owners require security of title so as to be able to order their affairs with reasonable certainty.

> Much has been said about the stability of titles and the Court in a case concerning such new views on the reservation of rights of way said in *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677: 'Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. . . . This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.' The Court in *Leo Sheep Co. v. United States*, reached such a conclusion after citing *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570, and stating the doctrine that when grants of federal lands are in issue doubts are resolved for the Government not against it.

Poverty Flats, 788 F.2d at 683.

The Court's reasoning in *Charlestone Stone Products* is also instructive:

> The fact that water may be valuable or marketable . . . is not enough to support a mining claim's validity based on the presence of water. Many substances present on the land may be of value. . . . In order for a claim to be valid, the substance discovered must not only be a "valuable mineral" within the dictionary definition of those words, but must also be the type of valuable mineral that the 1872 Congress intended to make the basis of a valid claim.

Charlestone Stone Products, 436 U.S. at 611.

The instant case does not involve the Mining Act of 1872, however, the definition of "valuable mineral" for the purposes of that Act sheds light on the meaning of that term as used in the Pittman Act. This Court in *Charlestone Stone Products*, and the Tenth Circuit in *Poverty Flats*, correctly perceived that a careful reading of congressional intent, contemporaneous meaning, and common sense were required. This case calls for no less.

NSSGA members across the western United States look to a settled interpretation of statutory terms on which to order their commercial affairs. Retroactive interpretations of statutory reservations made early in the twentieth century threaten the settled expectations of innumerable property owners in the twenty-first century, including NSSGA members. This Court should promote security and stability of title to lands patented under the federal public lands statutes, and hold that sand and gravel are not included as a matter of law in the term "valuable minerals," where that term is part of a reservation of minerals to the United States under the Pittman Act.

CONCLUSION

Amicus Curiae requests that this Court reverse the judgment of the Ninth Circuit, and overturn *Western Nuclear*.

Respectfully submitted,

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